

BEFORE THE ENVIRONMENTAL PROTECTION APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

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ENVIR. APPEALS BOARD

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In re: :  
: :  
Deseret Power Electric : PSD Appeal No. 07-03  
Cooperative :  
: :  
PSD Permit PSD-OU-0002-04.00 :  
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Washington, D.C.  
Thursday, May 29, 2008

The above-entitled matter came on  
for ORAL ARGUMENT at approximately 10:04 a.m.  
at the Environmental Protection Agency, 1201  
Constitution Avenue, NW, Washington, D.C.

BEFORE:  
  
EDWARD E. REICH  
KATHIE A. STEIN  
ANNA L. WOLGAST  
Presiding Judges

<p style="text-align: right;">2</p> <p>1 APPEARANCES:</p> <p>2 On behalf of Deseret Power Electric Cooperative:</p> <p>3 JAMES RUSSELL, ESQUIRE</p> <p>4 Winston &amp; Strawn, LLP</p> <p>5 1700 K Street, NW</p> <p>6 Washington, D.C. 20006-3817</p> <p>7 (202) 282-5000</p> <p>8 On behalf of Environmental Protection Agency:</p> <p>9 BRIAN L. DOSTER, ESQUIRE</p> <p>10 EPA Office of General Counsel</p> <p>11</p> <p>12 On behalf of Sierra Club:</p> <p>13 JOANNE SPALDING, ESQUIRE</p> <p>14 DAVID BOOKBINDER</p> <p>15 Sierra Club</p> <p>16 85 Second Street, Second Floor</p> <p>17 San Francisco, California 94105-3441</p> <p>18 (415) 977-5725</p> <p>19</p> <p>20 MORGAN COSTELLO, ESQUIRE</p> <p>21 Assistant Attorney General</p> <p>22 New York State Attorney General's Office</p> <p>On behalf of the Utility Air Regulatory Group:</p> <p>ALLISON WOOD, ESQUIRE</p> <p>Hunton &amp; Williams</p> <p>1900 K Street, NW</p> <p>Washington, D.C. 20006</p> <p>(202) 955-1500</p> <p>ALSO PRESENT:</p> <p>Eurika Durr</p> <p>Gary Millstein</p> <p style="text-align: center;">* * * * *</p>	<p style="text-align: right;">4</p> <p>1 whether the Region erred by failing to</p> <p>2 require a best available control technology</p> <p>3 limit for the control of carbon dioxide</p> <p>4 emissions, as Petitioner Sierra Club argues</p> <p>5 was required by Section 165 of the Clean Air</p> <p>6 Act.</p> <p>7 While Sierra Club's petition also</p> <p>8 raised a second issue relating to an alleged</p> <p>9 error in failing to consider certain</p> <p>10 alternatives to the proposed facility, review</p> <p>11 was not granted on that issue, although the</p> <p>12 Board continues to hold it under advisement.</p> <p>13 That, as said, is clearly specified in the</p> <p>14 Board's order of March 31, 2008 scheduling</p> <p>15 this argument. That issue is not within the</p> <p>16 scope of this morning's argument.</p> <p>17 I should also note that as invited</p> <p>18 by the Board's order granting review, the</p> <p>19 Board received a number of amicus briefs on</p> <p>20 both sides of the issue, and in fact, as I'll</p> <p>21 address shortly, certain amici have been</p> <p>22 invited to participate in this morning's</p>
<p style="text-align: right;">3</p> <p>1 PROCEEDINGS</p> <p>2 MS. DURR: The Environmental Appeals</p> <p>3 Board of the United States Environmental</p> <p>4 Protection Agency is now in session for oral</p> <p>5 argument in re: Deseret Power Electric</p> <p>6 Cooperative, Permit No. PSD-OU-0002-04.00,</p> <p>7 PSD Appeal No. 07-03, the Honorable Judges Anna</p> <p>8 Wolgast, Ed Reich, Kathie Stein presiding.</p> <p>9 Please turn off all cell phones,</p> <p>10 and no recording devices are allowed.</p> <p>11 Please be seated.</p> <p>12 JUDGE REICH: Good morning. We're</p> <p>13 hearing oral argument this morning in the matter</p> <p>14 of Deseret Power Electric Cooperative's Bonanza</p> <p>15 Power Plant, the PSD permit appeal pursuant to</p> <p>16 the Board's orders of March 31, 2008 and</p> <p>17 April 28, 2008.</p> <p>18 I would like initially to address</p> <p>19 the scope of this hearing. The sole issue</p> <p>20 before the Board in this hearing is the issue</p> <p>21 on which the Board granted review in its</p> <p>22 order of November 21, 2007. That issue is</p>	<p style="text-align: right;">5</p> <p>1 argument. A number of the amicus briefs</p> <p>2 discussed the issues of global warming, the</p> <p>3 contribution of greenhouse gases, and the</p> <p>4 implications for control in a much broader</p> <p>5 context than the issue before us today.</p> <p>6 While the Board greatly appreciates</p> <p>7 the time and effort of all the amici in</p> <p>8 attempting to assist the Board in its</p> <p>9 deliberations, we must reiterate that we are</p> <p>10 only focused on and empowered to address the</p> <p>11 much more narrowly-defined issues raised in</p> <p>12 the petition.</p> <p>13 Turning to how we'll proceed this</p> <p>14 morning, we will follow the order set forth</p> <p>15 in our April 28, 2008 order regarding oral</p> <p>16 argument. Sierra Club as Petitioner has been</p> <p>17 allocated 30 minutes for its argument, and</p> <p>18 may, if it chooses, reserve at the beginning</p> <p>19 of its argument up to five minutes for</p> <p>20 rebuttal.</p> <p>21 Then we will hear from one of the</p> <p>22 amici supporting Sierra Club's position for</p>

<p style="text-align: right;">6</p> <p>1 up to 15 minutes, that being counsel for  2 eight state attorneys filing  3 collectively -- more particularly, the  4 attorney generals of the states of New York,  5 California, Connecticut, Delaware, Maine,  6 Massachusetts, Rhode Island, and Vermont.  7 Then, EPA's regional office and  8 Office of Air and Radiation, as represented  9 by EPA's Office of General Counsel, will be  10 afforded 30 minutes, followed by Permittee  11 Deseret for 10 minutes, and amicus Utility  12 Air Regulatory Group, aligned with EPA, for  13 10 minutes. Then Sierra Club may use the  14 reserve time, if any, for rebuttal.  15 I would note that while the Board  16 invited the National Parks Conservation  17 Association, who filed an amicus brief  18 supporting the Petitioner, to make a brief  19 presentation, they notified the Board by  20 letter of May 27, 2008 that they will not be  21 making an appearance.  22 As to each of the amici</p>	<p style="text-align: right;">8</p> <p>1 order in which they will be arguing,  2 beginning with Sierra Club.  3 MS. SPALDING: Joanna Spalding for the  4 Sierra Club.  5 MS. COSTELLO: Morgan Costello,  6 assistant attorney general with the New York  7 State Attorney General's Office, on behalf of  8 the state (inaudible).  9 JUDGE REICH: Thank you.  10 MR. DOSTER: Brian Doster, EPA Office  11 of General Counsel.  12 MR. RUSSELL: Jim Russell, Winston &amp;  13 Strawn, on behalf of Deseret.  14 MS. WOOD: Allison Wood, Hunton &amp;  15 Williams, on behalf of the Utility Air  16 Regulatory Group.  17 JUDGE REICH: Thank you, Counsel.  18 Ms. Spalding, you may proceed. And  19 please advise us up front whether you're  20 reserving time for rebuttal.  21 MS. SPALDING: Good morning. My name  22 is Joanne Spalding, and I represent the Sierra</p>
<p style="text-align: right;">7</p> <p>1 participating in this argument, the Board's  2 order of April 28, 2008 specified which  3 portions of their brief the Board would like  4 them to address. It would be most helpful to  5 the Board in avoiding unnecessary repetition  6 if amici would focus their arguments  7 accordingly.  8 And finally, as those familiar with  9 oral arguments well know, the Board is likely  10 to ask numerous questions during the course  11 of this morning's argument. The Board's  12 purpose in asking these questions is to fully  13 probe the issues before it, and to assure the  14 Board's full understanding of the positions  15 of the various parties.  16 The questions themselves should not  17 in any way be interpreted as reflecting any  18 particular leaning of the Board, or even any  19 particular judge at this time.  20 Now I'd like to begin by asking  21 counsel to state their names for the record  22 and whom they represent, proceeding in the</p>	<p style="text-align: right;">9</p> <p>1 Club.  2 And yes, I would like to reserve  3 five minutes for rebuttal.  4 JUDGE REICH: Thank you.  5 Feel free to proceed.  6 MS. SPALDING: Thank you.  7 Deseret's Bonanza Plant will emit  8 1.8 million tons of carbon dioxide every  9 year, likely for half a century or more.  10 Carbon dioxide is a pollutant regulated under  11 the Clean Air Act. Congress mandated EPA  12 promulgate regulations requiring monitoring  13 and reporting of carbon dioxide when it  14 amended the Clean Air Act in 1990, and EPA  15 did promulgate those regulations in 1993.  16 Best Available Control Technology  17 is required for each pollutant subject to  18 regulation under the Act, so EPA must impose  19 BACT on Bonanza's carbon dioxide emissions.  20 Despite the statutory mandate, EPA  21 has refused to require BACT for carbon  22 dioxide emissions, narrowly interpreting the</p>

10	<p>1 meaning of the word "regulation." EPA's  2 position is wrong. It is at odds with the  3 plain meaning, structure, and history of the  4 Clean Air Act, and it is based on reasoning  5 that has been undermined by the Supreme  6 Court's decision in Massachusetts v. EPA.  7 Contrary to the Supreme Court's  8 admonition to give full effect to the broad  9 language of the Clean Air Act, EPA has  10 already precluded the Clean Air Act from  11 evolving to address changed circumstances and  12 scientific developments by applying BACT  13 narrowly. It is holding the PSD program  14 hostage to the administrator's delays in  15 making an endangerment finding, even though  16 the PSD provisions do not require an  17 endangerment determination.  18 JUDGE REICH: Let me ask, in terms of  19 your view of the term "subject to regulation  20 under the Act," does Sierra Club agree with the  21 position that the state AGs took in their brief  22 that it includes not only regulated air</p>	12	<p>1 The Board has --  2 JUDGE STEIN: Ms. Spalding?  3 MS. SPALDING: Yes.  4 JUDGE STEIN: You mentioned that you  5 think the term "subject to regulation" has a  6 plain meaning. If it has such a plain meaning,  7 why would they need to put that interpretation  8 out for notice and comment?  9 MS. SPALDING: Our position is that if  10 the EPA wishes to narrow the interpretation,  11 that it has a plain meaning that is broad, and  12 that the Clean Air Act uses the same term in two  13 places -- it says that BACT is required for any  14 pollutant subject to regulation in Section 165.  15 And then in Section 821, it says -- it requires  16 EPA to promulgate regulations.  17 And so -- and those terms mean the  18 same thing. And if the EPA would like to  19 interpret them in some different way, it at  20 least must do so in a way that provides a  21 reasoned basis for its decision, and that  22 it -- and that allows appropriate public</p>
11	<p>1 pollutants, but pollutants that the agency has  2 authority to regulate, where the agency has not  3 yet exercised that authority?  4 MS. SPALDING: The Sierra Club is in  5 this case arguing a narrower -- that, basically,  6 that you don't need to decide that issue here.  7 Carbon dioxide is already regulated under the  8 Act, and so the Board need not make that  9 determination at this time.  10 JUDGE REICH: Okay.  11 MS. SPALDING: EPA is playing hide the  12 ball and committing a procedural error by using  13 this permit proceeding to adopt an extremely  14 important legal interpretation that  15 impermissibly narrows a broad statutory  16 definition without ever putting that definition  17 out for public notice and comment.  18 Moreover, EPA's belated revelation  19 that Section 821 is not part of the Clean Air  20 Act is at odds with the language of that  21 provision, and with the Agency's prior  22 statements and implementation of it.</p>	13	<p>1 input into that determination.  2 The Board has the opportunity to  3 remedy these errors by remanding the permit  4 to Region 8, with instructions to include a  5 BACT limit for carbon dioxide.  6 Congress required BACT for each  7 pollutant subject to regulation, and then  8 ordered EPA to promulgate regulations  9 governing carbon dioxide emissions. It used  10 the same word in both places, and the  11 presumption is that it means the same thing.  12 The plain meaning of "regulation"  13 includes monitoring and reporting  14 regulations. The Supreme Court has so held  15 in the case of Buckley v. Vallejo.  16 Carbon dioxide is subject to  17 monitoring under the Act, and monitoring is a  18 form of regulation. So carbon dioxide is  19 subject to regulation.  20 To avoid requiring BACT for carbon  21 dioxide, EPA ignores this plain meaning by  22 interpreting "subject to regulation" to mean</p>

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1 "presently subject to a statutory or  
2 regulatory provision that requires actual  
3 control of emissions of that pollutant". Had  
4 Congress meant presently subject to actual  
5 control of emissions, it would have used  
6 narrower language to indicate that intent.  
7 Instead, it used "regulation," with  
8 the full understanding that regulations come  
9 in many varieties.  
10 EPA's gloss on the meaning of  
11 "regulation" substantially narrows the scope  
12 of the Clean Air Act, contrary to the Supreme  
13 Court's decision in Massachusetts v. EPA. If  
14 EPA is to construe "regulation" to mean  
15 something different, it must provide a  
16 reasoned basis for its decision.  
17 A broad definition of "regulation"  
18 in Section 165(a)(4) is consistent with the  
19 statutory scheme. The purpose of the PSD  
20 program is to protect public health and  
21 welfare from any actual or potential adverse  
22 effect from air pollution. This establishes

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1 a lower threshold than NAC's new source  
2 performance standards and motor vehicle  
3 emission standards. Unlike those provisions,  
4 no endangerment determination is needed to  
5 apply BACT to pollutants regulated under the  
6 Act.  
7 JUDGE REICH: Let me ask a little bit  
8 about the potential implications of your  
9 argument. A number of the amicus siding with  
10 the Agency talked about the implications in  
11 terms of the potentially significant expansion  
12 in the number of facilities that would be  
13 subject to the PSD process, and within that,  
14 BACT -- and that that had the potential to  
15 overburden the system, potentially drawing  
16 resources and attention away from facilities  
17 that might be more significant.  
18 Do you agree or disagree that  
19 determining that carbon dioxide is subject to  
20 regulation under the Act would substantially  
21 increase the number of facilities subject to  
22 PSD review? And if so, do you have any

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1 thoughts about whether the burden of dealing  
2 with that can be managed in some way?  
3 MS. SPALDING: Yes. First, let me say  
4 that administrative inconvenience in applying a  
5 statute cannot negate the applicability of the  
6 Act's requirements. And also, that a coal-fired  
7 power plant that will emit millions of tons of  
8 carbon dioxide should not be able to hide behind  
9 smaller emitters of carbon dioxide to avoid a  
10 statutory requirement.  
11 This is an issue that EPA will need  
12 to address. And frankly, it could have  
13 addressed the issue when it promulgated the  
14 regulations back in 1993 or in the 15 years  
15 since then, and has not done so. It can  
16 either address it administratively or by  
17 seeking some sort of a fix from Congress.  
18 And to the extent that the EPA has  
19 discretion, it should be taking this limit  
20 into consideration in the public process and  
21 invite public input. Actually, a remand is  
22 an appropriate mechanism at this point to

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1 allow the public to have input into that very  
2 question.  
3 So essentially, the --  
4 JUDGE REICH: Why would the remand in  
5 this case be a better vehicle than petitioning  
6 the Agency to modify the regulations to  
7 reconsider the way subject to the Act has been  
8 defined?  
9 MS. SPALDING: But the regulations  
10 don't -- do not narrow the scope of "subject to  
11 regulation." There's no way to petition the  
12 Agency -- we're happy with the regulation. The  
13 regulation says any "other pollutant subject to  
14 regulation under the Act." So the regulation is  
15 as broad as the statutory language. The  
16 only -- it is in this permit proceeding that the  
17 EPA has narrowly defined "regulation" to include  
18 actual control of emissions.  
19 And the only other place that  
20 that's been defined is in the Wegman memo.  
21 So there's not been -- it would not be  
22 logical for the public to actually submit any

18	<p>1 sort of rulemaking request to narrow 2 something that's not narrow. It's broad. 3 JUDGE STEIN: What about the 2002 4 rulemaking, the 1996 proposal and 2002 5 rulemaking? 6 MS. SPALDING: That's the rule to 7 which I am referring. It's a four-part 8 definition, and the fourth part says any other 9 pollutant and -- I might not be quoting this 10 exactly -- but any other pollutant otherwise 11 subject to regulation under the Act. 12 JUDGE STEIN: But CO2 is not on the 13 list of the pollutants that the Agency listed 14 or -- I understand that's preamble language 15 rather than regulatory text -- but what do you 16 make of the fact that CO2 is not on the list of 17 pollutants currently subject to -- 18 MS. SPALDING: That list has -- I have 19 a number of responses to that, if you have a 20 minute. That list is incomplete. It also does 21 not include PM 2.5, which is clearly subject to 22 regulation under the Act.</p>	20	<p>1 there was no public comment. And had there 2 been public comment, it would have -- the 3 public would have said there's a 4 broadly-worded rule, there's a list under 5 hazardous air pollutants that -- there was 6 nothing that you could have looked to to say 7 carbon dioxide is not included. 8 JUDGE REICH: Was every pollutant 9 included on that list that has this air 10 pollutant? 11 MS. SPALDING: Wait. I'm sorry? 12 JUDGE REICH: Was every pollutant that 13 was on that list that has this air pollutant? 14 MS. SPALDING: No, they were not. 15 JUDGE REICH: Well, then if you looked 16 at the list, you knew that obviously that was 17 attempting to address more than hazardous air 18 pollutants. The title of the section may not 19 have tipped you off, but the list itself was 20 pretty clear that that was broader than just 21 hazardous air pollutants. 22 MS. SPALDING: But it did not include</p>
19	<p>1 That list appears in a section both 2 in the 1996 proposed rule and in the final 3 rule that discusses how hazardous pollutants 4 will be dealt with under the BACT program, 5 and -- or as -- and whether or not hazardous 6 pollutants are regulated. In that preamble, 7 and I don't have it in front of me, but 8 there's a -- it specifically says that it is 9 addressing certain changes, including 10 hazardous air pollutants and stratospheric 11 ozone depletion in this rulemaking, and that 12 other changes related to the 1990 amendments 13 will be made later. 14 So there's no public notice. And 15 that, combined with the fact that the list 16 appears in the section dealing with hazardous 17 air pollutants and how they will be 18 addressed, plus the fact that in the 1996 19 proposed rule, there was no attempt to define 20 a regulated NSR (?) pollutant or pollutants 21 subject to regulation. That definition only 22 came with the final rule in 2002, on which</p>	21	<p>1 PM 2.5, and I think that's a -- 2 JUDGE REICH: And a -- 3 MS. SPALDING: Excuse me -- 4 JUDGE REICH: It did include PM 10, 5 which Agency was using as a surrogate for 6 PM 2.5. 7 MS. SPALDING: That's correct, but 8 it's -- still, PM 2.5 is a hazardous -- I mean, 9 not a -- is a pollutant subject to regulation. 10 JUDGE REICH: As far as you know, is 11 PM 2.5 the only thing not included on the list? 12 Apart from carbon dioxide. 13 MS. SPALDING: As far as I know. 14 JUDGE REICH: Okay. 15 MS. SPALDING: I can't say -- I'm not 16 an expert on that, so -- 17 JUDGE REICH: Right. 18 MS. SPALDING: But I also think it's 19 an extremely heavy burden to put on the public 20 to read into a section that's labeled "Hazardous 21 Air Pollutants" an entire exhaustive list, when 22 the proposed rulemaking specifically said that</p>

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1 it would not -- was only addressing limited  
2 portions of the Clean Air Act amendments of 1990  
3 with regard to how they would be incorporated  
4 into the PSD provisions.  
5 JUDGE WOLGAST: What significance do  
6 you attribute to the lack of a specific  
7 reference to the so-called catch-all provision  
8 of Category 4 in the 2002 preamble?  
9 MS. SPALDING: To the lack of a -- in  
10 the preamble? Well, I actually think that that  
11 supports the argument that that phrase is as  
12 broad as the Act. That the preamble addressed  
13 what the other categories were, and that that  
14 particular -- and the last catch all-phrase is  
15 as broad as the statute itself.  
16 JUDGE STEIN: If we were to agree with  
17 you and decide that this permit needed to be  
18 remanded, what would happen next in terms of the  
19 remand? Essentially, you're asking for the  
20 Agency and the company to go through a BACT  
21 determination for CO2. Is that the outstanding  
22 issue that you're asking?

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1 MS. SPALDING: Yes. The Sierra Club  
2 is seeking a BACT determination for CO2, and  
3 public input into that determination as required  
4 by the PSD provisions.  
5 JUDGE STEIN: Has there been a BACT  
6 determination for CO2 anywhere in the country,  
7 to your knowledge?  
8 MS. SPALDING: Not to my knowledge.  
9 JUDGE STEIN: Has anyone gone through  
10 the process of a BACT evaluation, of just going  
11 through all of the various steps that would go  
12 into determining what BACT is?  
13 MS. SPALDING: You know, I have to  
14 apologize for my -- I actually seem to remember  
15 that there were one or two states that might be  
16 starting that process. And I don't know the  
17 details. I apologize for that.  
18 The PSD program is the most logical  
19 place to begin looking at control  
20 technologies for pollutants, because when  
21 such technologies are developed, new and  
22 modified sources offer the greatest

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1 flexibility for using them. It makes perfect  
2 sense to apply BACT to pollutants that may  
3 not be regulated under provisions that  
4 require an endangerment finding.  
5 Within the PSD provisions, BACT  
6 applies the most broadly. It applies to each  
7 pollutant subject to regulation under the  
8 Act, whereas other provisions of the PSD  
9 program apply only to pollutants -- for  
10 example, that are subject to maximum  
11 allowable increases.  
12 So it is the most broad provision  
13 in both the PSD program and in the statute as  
14 a whole in terms of the purpose and what it  
15 applies to.  
16 The lowered threshold for  
17 triggering BACT makes sense within the  
18 statutory structure, because BACT is not a  
19 generally applicable standard, but rather, a  
20 case-by-case analysis that allows for  
21 balancing of energy, environmental, and  
22 economic impacts and other costs. It is

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1 conducted under EPA regulations that allow  
2 the administrator to guide the analysis of  
3 potential adverse effects. And it includes a  
4 mechanism for the administrator to exercise  
5 his judgment by weighing in on the BACT  
6 analysis for any particular source.  
7 The D.C. Circuit recognized in  
8 *Alabama Power v. Castle* (?) that BACT can  
9 apply even to pollutants determined not to  
10 present substantial public health or welfare  
11 concerns, and immediately to each type of  
12 pollutant regulated for any purpose under any  
13 provision of the Act.  
14 JUDGE REICH: Did they talk about  
15 regulated for any purpose? Is that language in  
16 the actual --  
17 MS. SPALDING: That's a quote.  
18 JUDGE REICH: And what was the  
19 particular issue they were dealing with in  
20 *Alabama Power*? Was it parallel to this?  
21 MS. SPALDING: Well, it certainly had  
22 similarities. It was -- the statute at that

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1 time was different, and so -- but yes, I think  
2 that essentially it was parallel. They were  
3 dealing with a situation where industry was  
4 arguing that pollutants that had not yet  
5 been -- for which maximum allowable increments  
6 had not yet been determined --  
7 JUDGE REICH: But weren't those  
8 pollutants regulated under the Act in some way  
9 at that time? There weren't increments, but at  
10 least the Agency asserts that all those  
11 pollutants were in fact regulated in some way,  
12 and what the court was really doing -- and  
13 reading the case, it certainly lends itself to  
14 that interpretation -- was dealing with the  
15 interplay between 165 and 166, and whether the  
16 fact that they needed to do study under 166 took  
17 them out from under the umbrella of 165.  
18 But it really didn't seem to be  
19 focused on pollutants for which there was no  
20 regulation whatsoever yet.  
21 MS. SPALDING: Well, we aren't dealing  
22 with a pollutant for which there's no regulation

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1 whatsoever. We're dealing with a pollutant that  
2 is regulated by monitoring and reporting  
3 requirements.  
4 And so while it is not exactly  
5 comparable, it does -- and the statute had a  
6 different structure at that time, so that the  
7 pollutants that were regulated under the Act  
8 were perhaps more subject to emissions  
9 controls. But it still stands for the  
10 proposition that the statutory language is  
11 broad. EPA has interpreted it broadly, and  
12 the court has affirmed that broad  
13 interpretation.  
14 JUDGE REICH: If it -- does it go  
15 beyond allowing us to conclude that if it's  
16 regulated under the Act, then it requires  
17 BACT -- does it go to the next step and tell us  
18 what is regulated under the Act, or is it just  
19 talking about the implications of being  
20 regulated under the Act.  
21 MS. SPALDING: Does Alabama Power --  
22 JUDGE REICH: Yeah.

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1 MS. SPALDING: It has some language  
2 about which pollutants are regulated, and in  
3 fact, there's a footnote -- I think it's a  
4 footnote 134 that specifically says that a  
5 pollutant can be regulated under BACT even if it  
6 does not present a substantial -- and actually,  
7 let me get the quote, because I -- "even for  
8 pollutants determined not to present substantial  
9 public health or welfare concerns."  
10 JUDGE REICH: But again, my question  
11 really is whether Alabama Power is instructive  
12 only as to the implications of being regulated,  
13 or whether it's also instructive as to what it  
14 means to be regulated.  
15 MS. SPALDING: Well, I think that the  
16 language "for any purpose regulated for any  
17 purpose under the Act" is instructive.  
18 So, and --  
19 JUDGE REICH: Okay.  
20 MS. SPALDING: The only place that EPA  
21 has stated its narrow interpretation that it now  
22 advances in this case is the Wegman memo, which

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1 is an internal agency memo which defined  
2 "pollutant" narrowly to exclude carbon dioxide  
3 based on the rationale that Congress did not  
4 intend to regulate sources of carbon dioxide and  
5 methane.  
6 The Massachusetts v. EPA case has  
7 demonstrated the fallacy of this rationale.  
8 That memo limited pollutants subject to  
9 regulation under the Act to those subject to  
10 actual control of emissions based on the same  
11 rationale. The memo excludes carbon dioxide  
12 and methane as subject to regulation under  
13 the Act expressly to avoid regulating sources  
14 of these pollutants.  
15 Contrary to EPA's arguments,  
16 Section 821 is part of the Clean Air Act.  
17 The monitoring and reporting of carbon  
18 dioxide that's required by that provision is  
19 required and enforceable under the Act.  
20 Monitoring, reporting, record  
21 keeping, and enforcement provisions of  
22 Section 821 are inextricably linked to

30	<p>1 Section 412.</p> <p>2 JUDGE REICH: Can I ask -- if we</p> <p>3 decided, contrary to your argument, that</p> <p>4 Congress did not intend 821 to be part of the</p> <p>5 Clean Air Act, what relevance at all should we</p> <p>6 give to Agency statements to the contrary? Is</p> <p>7 there anything that the Agency could have done</p> <p>8 inadvertently by referring to it as being part</p> <p>9 of the Act that would make it part of the Act if</p> <p>10 we determined Congress had not intended that?</p> <p>11 MS. SPALDING: The Agency statements</p> <p>12 in and of themselves cannot make it part of the</p> <p>13 Act if Congress didn't intend it. But Congress</p> <p>14 did intend it to be part of the Act.</p> <p>15 JUDGE REICH: Right, I understand.</p> <p>16 MS. SPALDING: And EPA has implemented</p> <p>17 it as part of the Act. It has adopted</p> <p>18 regulations for Sections 412 and 821 together.</p> <p>19 Section 821 explicitly requires</p> <p>20 that the prohibition provisions of</p> <p>21 Section 412 apply to violations of</p> <p>22 Section 821, making it enforceable under the</p>	32	<p>1 it -- it's a different -- those are different</p> <p>2 words, and they have significance in this</p> <p>3 context because Section 165, the BACT</p> <p>4 provisions, apply only to new and modified</p> <p>5 sources. So it wouldn't be reducing any</p> <p>6 existing emissions of carbon dioxide. It</p> <p>7 would only apply for a new source or a source</p> <p>8 that undertook modifications.</p> <p>9 JUDGE REICH: In the UARG brief, they</p> <p>10 quote another part of the legislative history,</p> <p>11 and I'm taking it at face value -- there's a</p> <p>12 statement by one of the sponsors of the</p> <p>13 amendment that laid out a threefold purpose.</p> <p>14 And it was on page 12 of their brief. And what</p> <p>15 it says is this: "The purpose of this provision</p> <p>16 is threefold. First, in order to furnish better</p> <p>17 scientific evidence so that we will know exactly</p> <p>18 what the U.S. contribution to the problem of</p> <p>19 global warming is."</p> <p>20 I'm going to skip parts of it.</p> <p>21 "Second, Mr. Chairman, we need to</p> <p>22 form a baseline so we know what the utility</p>
31	<p>1 Clean Air Act. That means it can be enforced</p> <p>2 both by the Agency under Section 113 and</p> <p>3 through citizen suits under Section 304. The</p> <p>4 regulations are consistent, stating that a</p> <p>5 violation of the regulations is a violation</p> <p>6 of the Act.</p> <p>7 JUDGE WOLGAST: What significance do</p> <p>8 you give the legislative history that both the</p> <p>9 Agency and your cite in support of their</p> <p>10 argument -- that this should be read more</p> <p>11 narrowly and it wasn't intended that CO2 to be</p> <p>12 subject to regulation under the Act?</p> <p>13 MS. SPALDING: The language that they</p> <p>14 cite says that the provision does not force</p> <p>15 reductions of carbon dioxide, and this is</p> <p>16 actually consistent with reading Section 821 as</p> <p>17 part of the Act and as subject to BACT.</p> <p>18 First of all, I want to note that</p> <p>19 in spite of the characterization in the</p> <p>20 UARG brief, the legislative history did not</p> <p>21 say it would not require emissions controls.</p> <p>22 It said it would not force reductions. If</p>	33	<p>1 effort is in cleaning up the problem so we</p> <p>2 know when to give them credit for their</p> <p>3 reductions. Finally, we need to know in</p> <p>4 order to form a proper role in international</p> <p>5 negotiations so we can know what the U.S.</p> <p>6 Contributions to the problem is."</p> <p>7 Do you disagree that those were the</p> <p>8 goals of the sponsor, and if so, how does</p> <p>9 making carbon dioxide an element of BACT</p> <p>10 further those goals?</p> <p>11 MS. SPALDING: Those are the primary</p> <p>12 goals that were listed in the regulatory history</p> <p>13 when the amendment was offered on the House</p> <p>14 floor.</p> <p>15 JUDGE REICH: And what, beyond the</p> <p>16 monitoring itself, does making it subject to</p> <p>17 BACT review add to furthering those goals?</p> <p>18 MS. SPALDING: It furthers those goals</p> <p>19 by actually taking steps toward -- well, first</p> <p>20 of all, it requires monitoring, and the</p> <p>21 monitoring enables utilities to determine what</p> <p>22 their emissions are. And as they implement BACT</p>

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1 requirements, they -- as they modify sources,  
2 for instance, then they can take credit for  
3 those reductions. They will be monitoring those  
4 emissions and they can take credit for those  
5 reductions.

6 In terms of international  
7 negotiations, the United States can take  
8 credit for those reductions.

9 And there is legislative history  
10 that says "by establishing an early baseline  
11 of carbon dioxide emissions for domestic  
12 utility companies, we will put the United  
13 States in a position to take credit for its  
14 efforts to control emissions."

15 That's actually the only place  
16 where it talks about controlling emissions.  
17 It doesn't say that it will not force  
18 emissions controls.

19 JUDGE REICH: But what I'm trying to  
20 understand is beyond the monitoring, which  
21 clearly 821 contemplates and nobody is disputing  
22 the enforceability of 821 in some

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1 fashion -- what making it further subject to  
2 BACT review adds to furthering those three  
3 goals?

4 MS. SPALDING: It furthers those three  
5 goals by -- well, one of the purposes was to  
6 gather information about carbon dioxide, and the  
7 BACT process is actually quite conducive to  
8 gathering information and implementing controls  
9 only as the technology becomes available. It is  
10 not -- it doesn't require technologies that  
11 aren't available to be developed. It doesn't  
12 require technologies that are not cost-effective  
13 to be implemented. So that as the science  
14 advances and as information is gathered, we can  
15 also be looking at those technologies and  
16 watching them develop in the BACT process.

17 Again, for new sources and modified  
18 sources which offer the most flexibility in  
19 terms of installing new technologies or  
20 making use of them.

21 JUDGE REICH: In terms of looking for  
22 indicia of whether Congress intended 821 to be

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1 part of the Clean Air Act or not, a couple of  
2 things that the Agency cites are the absence of  
3 amendatory language. But also the fact that in  
4 referring to other parts of the Clean Air Act,  
5 they talk about section so-and-so of the Clean  
6 Air Act. Are you aware offhand if there were  
7 any other provisions in the Clean Air Act that  
8 reference a different provision of the Clean Air  
9 Act as such-and-such of the Clean Air Act, as  
10 opposed to of this Act or the Act? Is there  
11 anything else analogous?

12 MS. SPALDING: I cannot cite one off  
13 the top of my head, no. I do think that the  
14 language needs to be taken as a whole, and you  
15 need to -- the fact that it's a note to a  
16 provision that is where it incorporates the  
17 prohibition requirements, and that it is -- it  
18 becomes regulated under the Act because it's  
19 enforceable under the Act, and the requirements  
20 are enforceable. They're inextricably linked  
21 together. And so looking at the provision as a  
22 whole indicates that it's part of the Clean Air

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1 Act.

2 I also wanted to just point out one  
3 more thing about the legislative history.  
4 Another statement was by -- I think  
5 Congressman Moorhead -- was, "What I hope to  
6 achieve with this amendment is the  
7 elimination of the possibility that U.S.  
8 utilities will force CO2 emissions," -- I'm  
9 sorry, "will reduce CO2 emissions as a  
10 consequence of compliance with these Clean  
11 Air Act amendments, and not get credit for  
12 these reductions in the future."

13 And I think that speaks a little  
14 bit to what you were talking about before,  
15 that where it explicitly contemplates that  
16 implementation of the 1990 amendments might  
17 result in reduced carbon dioxide emissions.

18 JUDGE REICH: Thank you. Your time  
19 has expired. Let me see if my colleagues have  
20 further questions. Nope.

21 Okay, thank you, Ms. Spalding.  
22 Ms. Costello?

38	<p>1 MS. COSTELLO: Yes, good morning.  2 JUDGE REICH: Good morning.  3 MS. COSTELLO: At issue in this  4 proceeding is whether EPA committed a clear  5 error of law when it determined that the phrase  6 "subject to regulation" under the Clean Air Act  7 constrained its authority to impose limits in a  8 PSD permit on pollutants that unquestionably  9 adversely affect public health and welfare.  10 In response to comments, EPA stated  11 "EPA does not currently have the authority to  12 address the challenge of global climate  13 change by imposing limitations on the  14 emissions of CO2 and other greenhouse gases  15 in PSD permits."  16 This conclusion was erroneous for  17 three primary reasons. First, EPA has the  18 authority under the Clean Air Act to regulate  19 CO2, and it should be imposing limits on such  20 emissions based on their incontrovertible  21 adverse effect on public health and welfare.  22 The Clean Air Act -- number two.</p>	40	<p>1 serious and well-recognized.  2 EPA does not question the  3 seriousness of CO2 as an air pollutant. In  4 their denial of a waiver to California for  5 their greenhouse gas emission standards for  6 new motor vehicles, the EPA publicly and  7 expressly endorsed in the Federal Register  8 the scientific consensus reflected in the  9 IPCC's summary for policymakers that global  10 warming is unequivocal, that emissions of CO2  11 and other greenhouse gases are contributing  12 to global warming, and that such warming  13 poses numerous dangers to public health and  14 welfare.  15 The EPA administrator personally  16 approved an affirmative endangerment  17 determination, and transmitted a draft  18 Federal Register notice announcing such  19 determination to the White House Office of  20 Management and Budget over five months ago.  21 EPA's constrained interpretation of  22 the authority under the Act ignores the plain</p>
39	<p>1 The Clean Air Act requires EPA to impose BACT  2 emission limits on pollutants that are  3 subject to regulation, not pollutants that  4 are already regulated. The words "subject  5 to" must be given meaning; otherwise, they're  6 superfluous.  7 And number three, concluding that  8 EPA has an obligation to set binding emission  9 limits for CO2 as a pollutant subject to  10 regulation under the Clean Air Act is  11 consistent with the legislative purpose and  12 the intent of the PSD program.  13 EPA has the authority and should be  14 limiting CO2 emissions. There's no serious  15 question about that. Massachusetts v. EPA,  16 the Supreme Court held that the EPA has the  17 authority to regulate CO2, and must  18 determine, based solely on the science,  19 whether such emissions endanger health and  20 welfare.  21 The Court also stated that the  22 harms associated with climate change are</p>	41	<p>1 statutory language. The meaning of "subject  2 to regulation" in the context of the PSD  3 program is much broader than EPA's  4 interpretation.  5 JUDGE REICH: How would you define  6 that?  7 MS. COSTELLO: We would define  8 "subject to regulation" as subject -- EPA has  9 the authority to regulate it and should be  10 regulating it because of its adverse effects on  11 public health and welfare, its actual or  12 potential -- as the intent of the PSD program  13 that's stated in Section 160 of the Act  14 expressly says that the purpose of the PSD  15 program is to protect public health and welfare  16 from any actual or potential adverse effect  17 which in administrator's judgment may reasonably  18 anticipated to occur.  19 The EPA's and the Permittee's  20 interpretation make the word "subject to"  21 entirely superfluous. Congress did not say  22 "regulated pollutants." Congress did not say</p>

<p style="text-align: right;">42</p> <p>1 "pollutants presently subject to a statutory 2 or regulatory provision." If Congress had 3 intended to limit the applicability of the 4 PSD program to pollutants that were already 5 subject to binding emissions limits or 6 otherwise regulated, it would have and could 7 have said so, but it did not. 8 The interpretation the EPA is 9 currently giving to "subject to" is also 10 inconsistent with how EPA has interpreted 11 that language in other contexts and other 12 statute -- environmental laws that -- we 13 cited one example of that in our brief, which 14 was a memo in 1995 interpreting the phrase 15 "subject to" under the Resource Conservation 16 and Recovery Act and the Clean Water Act. 17 EPA interpreted -- the memo says "EPA has 18 consistently interpreted the language 'point 19 sources' subject to the Clean Water Act to 20 mean 'point sources' that should have a 21 discharge permit in place whether in fact 22 they do or not."</p>	<p style="text-align: right;">44</p> <p>1 affect public health and welfare. 2 JUDGE WOLGAST: But as Judge Reich was 3 alluding to in his -- as you said, under 4 the -- I think it was Shapiro memo that you're 5 referring to -- there, those entities were 6 regulated. It was just a question of whether 7 they had their paper; i.e., their permit, in 8 place. But they were under regulation at that 9 point, were they not? 10 MS. COSTELLO: Yes. And here, we're 11 talking about sources that are already regulated 12 under -- or are regulated under the PSD program. 13 In particular here, the Deseret power plant. 14 There's no question that coal-fired power plants 15 are sources that are regulated and are required 16 to obtain a permit -- 17 JUDGE REICH: But we're not talking 18 about facilities being regulated, we're talking 19 about pollutants being regulated. 20 MS. COSTELLO: That is correct. And I 21 think that the context of this memo and the use 22 of the words "subject to" in the context of the</p>
<p style="text-align: right;">43</p> <p>1 EPA has not addressed this 2 inconsistency. 3 JUDGE REICH: In that example -- I 4 want to see how analogous it is. That example 5 was a circumstance where there was a clear 6 requirement to obtain a permit, and they were 7 talking about the universe of facilities that 8 were subject to that requirement that had not 9 yet obtained a permit. And I -- therefore, this 10 "subject to regulation" I think springs from the 11 clear statutory requirement to have a permit. 12 Is that truly analogous to what 13 we're dealing with here? 14 MS. COSTELLO: Yes, I believe it is. 15 Because I believe that -- 16 JUDGE REICH: Where's the clear 17 mandate? 18 MS. COSTELLO: Well, the mandate is on 19 EPA to protect public health and welfare. And 20 here, the interpretation that's being given by 21 EPA is constraining their authority to address a 22 pollutant that has been shown to adversely</p>	<p style="text-align: right;">45</p> <p>1 Clean Water Act is a closer analogy than there 2 in UARG's brief. They cited to the Mobil Oil 3 Corporation case, where the Board considered the 4 words "subject to" in a different statutory 5 context. 6 That statutory context was -- they 7 were interpreting under the federally 8 permitted release exemption that's contained 9 in the Emergency Planning and Community Right 10 to Know Act, which incorporated a phrase from 11 CERCLA, and it excluded from the reporting 12 requirements any releases that were subject 13 to a permit. 14 And in that context, it was -- they 15 were construing an exclusion of authority. 16 And here, what EPA's interpretation is would 17 be an exclusion from their authority, which 18 under statutory interpretation principles 19 should be construed narrowly. The 20 interpretation that we believe is 21 appropriate, which is "subject to 22 regulation," is broader, and it gives EPA the</p>

46	<p>1 authority to address pollutants that it has</p> <p>2 the authority to regulate and it should be</p> <p>3 regulating -- is not seeking to exclude or</p> <p>4 place limits on EPA's authority.</p> <p>5 JUDGE REICH: So you are not</p> <p>6 arguing -- because I wasn't sure from the brief.</p> <p>7 You're not arguing that "subject to regulation"</p> <p>8 extends to every pollutant the Agency has</p> <p>9 authority to regulate. You're saying it only</p> <p>10 extends to a subset of that universe, based on</p> <p>11 some determination about which pollutants are</p> <p>12 appropriate to regulate in the PSD context? Is</p> <p>13 that in essence what you're saying?</p> <p>14 MS. COSTELLO: It's based on the</p> <p>15 potential or actual adverse effects on public</p> <p>16 health and welfare, which --</p> <p>17 JUDGE REICH: And is there a standard?</p> <p>18 I mean, that's what you consider, but is there a</p> <p>19 standard that says these are effects that are</p> <p>20 significant enough that it should be regulated</p> <p>21 and these aren't? How do you apply that in a</p> <p>22 particular case?</p>	48	<p>1 conceptually for other pollutants?</p> <p>2 MS. COSTELLO: Conceptually, I</p> <p>3 hesitate to speculate as to what other</p> <p>4 pollutants it might be extended to at this</p> <p>5 point, because I think we're not right now</p> <p>6 talking about any other pollutants.</p> <p>7 We're talking about CO2, which</p> <p>8 has -- which is unquestionably adversely</p> <p>9 affecting public health and welfare.</p> <p>10 JUDGE REICH: Thank you, Ms. Costello.</p> <p>11 MS. COSTELLO: You're welcome.</p> <p>12 JUDGE REICH: I believe your time has</p> <p>13 expired.</p> <p>14 MS. COSTELLO: Oh, it has? Okay.</p> <p>15 That was quick. Thank you.</p> <p>16 MR. DOSTER: Good morning. Brian</p> <p>17 Doster from the EPA Office of General Counsel,</p> <p>18 Air and Radiation Law Office. I'm appearing</p> <p>19 here today on behalf of Region 8, the</p> <p>20 Respondent, and the Office of Air and</p> <p>21 Radiation's participating amicus.</p> <p>22 The Board should uphold the</p>
47	<p>1 MS. COSTELLO: I think that that would</p> <p>2 be up to the Agency and the administrator to</p> <p>3 determine.</p> <p>4 JUDGE REICH: In a case-by-case?</p> <p>5 MS. COSTELLO: On a case-by-case</p> <p>6 basis, exactly, because the PSD program applies</p> <p>7 on a case-by-case basis. And it applies to new</p> <p>8 and modified sources, and that is exactly the</p> <p>9 area in which EPA should have the authority to</p> <p>10 address --</p> <p>11 JUDGE REICH: So does that mean that a</p> <p>12 pollutant could be regulated under the Act</p> <p>13 relative to one facility but not another</p> <p>14 facility?</p> <p>15 MS. COSTELLO: I think in terms of</p> <p>16 carbon dioxide that, given the nature of that</p> <p>17 air pollutant and the global nature of the harms</p> <p>18 to public health and welfare, that it would not</p> <p>19 vary -- you know, the requirement to address CO2</p> <p>20 in the permitting proceeding would not vary from</p> <p>21 plant to plant.</p> <p>22 JUDGE REICH: But could it</p>	49	<p>1 Region 8 action in this case because it is</p> <p>2 grounded on a permissible interpretation of</p> <p>3 the PSD provisions of the Clean Air Act that</p> <p>4 EPA has consistently followed for nearly 30</p> <p>5 years. EPA's historic view that a pollutant</p> <p>6 subject to regulation is a pollutant for</p> <p>7 which EPA or Congress have required actual</p> <p>8 controls on emissions is consistent with an</p> <p>9 accepted meaning of the term "regulation" and</p> <p>10 the context of the Clean Air Act.</p> <p>11 Petitioners and amici have not demonstrated</p> <p>12 that this interpretation is clearly</p> <p>13 erroneous.</p> <p>14 JUDGE STEIN: Mr. Doster, let me get</p> <p>15 to the heart of one of my questions. You</p> <p>16 started your remarks with the observation that</p> <p>17 EPA believes this interpretation is permissible.</p> <p>18 Does that mean that EPA is no longer contending</p> <p>19 that it lacks the authority, simply that it's a</p> <p>20 permissible interpretation?</p> <p>21 MR. DOSTER: We've never contended</p> <p>22 that we lack the authority. We clearly could</p>

50	<p>1 write a new source performance standard and  2 regulate CO2 under that provision, which would  3 trigger the PSD program.</p> <p>4 The particular statement that  5 you're referring to on our response to  6 comment was that with respect to this  7 particular pollutant, CO2, we do not  8 currently have the authority to regulate it  9 because it is not a regulated NSR pollutant.  10 We don't have the authority to subject it to  11 an emissions limit in the PSD program, more  12 specifically.</p> <p>13 JUDGE STEIN: So what you're saying,  14 you don't have the legal authority to interpret  15 "subject to regulation" in a way -- i.e.  16 821 -- that would allow for you to interpret the  17 term in a way that you could consider a  18 regulated pollutant?</p> <p>19 MR. DOSTER: I see your point, Your  20 Honor.</p> <p>21 At the time of our response to  22 comments, given our prevailing interpretation</p>	52	<p>1 and it applies a permissible meaning.  2 Petitioners have cited several  3 dictionary definitions of the meaning of the  4 term "regulation."  5 We've cited another dictionary  6 definition. Both are equally valid  7 definitions of the term "regulation." And  8 our definition is that "regulation" refers to  9 the act or process of controlling by rule or  10 restriction -- is a fair interpretation.  11 It -- sorry about that. I'll just  12 continue.</p> <p>13 Our interpretation is based on an  14 accepted meaning of the term "regulation."  15 So our interpretation is not impermissible  16 either. It is a fair interpretation of the  17 Act, it makes sense in the context of the  18 Clean Air Act, given that there are various  19 provisions in the Act that call for the  20 administrator to exercise his judgment as to  21 whether it is appropriate to regulate a  22 pollutant -- to establish controls on a</p>
51	<p>1 that "subject to regulation" referred to a  2 pollutant subject to actual controls, we  3 expressed the view that given that  4 interpretation -- under that interpretation,  5 we did not have the authority to do so.</p> <p>6 Under the interpretation that  7 Petitioners have espoused in this case, which  8 we do not contend is an impermissible  9 interpretation, it's just simply not just the  10 best reading, and it is not the reading that  11 we have followed for 30 years in the past.</p> <p>12 So if your point is might we have  13 the discretion to interpret the provision the  14 way the Petitioners contend, because we don't  15 believe that there is a clear meaning here, I  16 don't contest that may be a possible  17 interpretation.</p> <p>18 I don't think that interpretation  19 is consistent with the context of the Act.  20 It's certainly different from our historic  21 interpretation, which is permissible and  22 grounded firmly in the context of the Act,</p>	53	<p>1 pollutant.  2 And it makes sense in the statutory  3 scheme for a provision that addresses the  4 control of emissions based on determinations  5 to regulate those emissions elsewhere under  6 the Clean Air Act -- it makes sense to ground  7 that determination on the judgment of the  8 administrator, or an expressed determination  9 by Congress that that emission, that  10 pollutant is subject to control.</p> <p>11 If I might continue with my  12 argument, I'd like to note that the Board has  13 heard this issue once before in the Christian  14 County case, and since that time, we've seen  15 a number of additional briefs submitted and  16 45 minutes of oral argument here today.</p> <p>17 But I think what's really striking  18 since -- after all this advocacy, is that no  19 party has demonstrated to this Board that any  20 entity with the authority to make CO2 a  21 regulated NSR pollutant has clearly expressed  22 the intent to do so -- not the Congress, not</p>

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<p>1 the Supreme Court or the lower courts, not  2 the administrator or any permitting  3 authority, state or federal.</p> <p>4 Furthermore, neither this Board,  5 the EPA General Counsel, or any other Agency  6 official has interpreted these actions of  7 Congress, the courts, or the administrator to  8 have the effect of making carbon dioxide a  9 pollutant subject to regulation under the  10 Act.</p> <p>11 Yet Petitioners appear before you  12 today advocating that we have been missing a  13 plain meaning -- that all of these people  14 have been missing a plain meaning of the  15 Clean Air Act for almost 18 years. But  16 the -- at no time in that period of time have  17 the Petitioners or any other party raised  18 this legal theory to the Agency based on this  19 plain meaning of the Act.</p> <p>20 And the authorities and the  21 provisions on which they base this argument  22 have been available throughout this entire</p>	<p>1 regulations in 5221, I note that we define  2 the "major stationary source," and that's  3 defined in terms of "any regulated NSR  4 pollutant," which on its face seems a  5 narrower term. And I'm wondering how we got  6 from "any air pollutant" in 169 to "regulated  7 NSR pollutant" in the regs, and if that  8 reflected the interpretation in the Wegman  9 memo that Congress intended the broader term  10 "air pollutant" to really just mean the  11 subset of "regulated pollutants."</p> <p>12 And that premise is now  13 questionable, at best, given Massachusetts,  14 whether we now have a set of regulations that  15 don't really track what Congress promulgated.</p> <p>16 And I ask this -- I want to be  17 clear, not because I think this is a forum  18 for challenging EPA regulations, because it's  19 not. But I think it may be relevant in terms  20 of understanding what Congress may or may not  21 have had in mind relative to sources that  22 emit carbon dioxide, in terms at least of the</p>
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<p>1 time. And the only new development is the  2 Massachusetts v. EPA Supreme Court decision,  3 and the Board has already recognized that in  4 its Christian County opinion that the  5 interpretation reflected in that opinion by  6 itself does not compel the regulation of CO2  7 in PSD permits.</p> <p>8 JUDGE REICH: Mr. Doster, I'm a little  9 bit puzzled by something. It's a little bit  10 broader than the specifics of the case, but it  11 may have some implications in terms of the case.  12 Maybe you can help kind of walk me through this.  13 Looking at the applicability of the PSD  14 permitting program as a whole -- putting aside  15 for the moment the BACT component -- if I look  16 at how the statute applies to a major emitting  17 facility, if I looked at the definition of  18 "major emitting facility" in 169, it frames the  19 applicability in terms of tons per year of any  20 pollutant. It doesn't at that point talk about  21 any regulated pollutant.</p> <p>22 When I look at the implementing</p>	<p>1 PSD program as a whole.  2 So if I didn't lose you in that.  3 MR. DOSTER: I'm with you.  4 JUDGE REICH: Okay.  5 MR. DOSTER: I know exactly what  6 you're talking about.  7 JUDGE REICH: Can you help me there?  8 MR. DOSTER: The practical  9 significance of the provision you're talking  10 about in our rules really is to determine which  11 pollutants we consider in determining whether a  12 source is a major source, in determining  13 whether -- you know, a source emits more than  14 100 or 250 tons per year of an individual  15 pollutant.</p> <p>16 EPA has traditionally, as reflected  17 in that language that you've quoted from the  18 rules, we have traditionally interpreted the  19 term "pollutant" from Section 169.</p> <p>20 One, that I think the definition of  21 "major emitting facility," we've  22 traditionally interpreted that to refer to</p>

58	<p>1 regulated pollutants, as reflected in that  2 definition, for the simple reason that  3 we -- we haven't been determining  4 applicability. If that were the case, we  5 would be already in the boat that the  6 Industry Petitioners are gravely concerned  7 about, which is that a number of additional  8 small sources would be subject to the PSD  9 program based on any number of emissions,  10 particularly CO2 emissions here, which it  11 doesn't take a very big facility or a very  12 big combustion source in order to have more  13 than 100 or 250 tons of emissions.  14 JUDGE REICH: That's precisely what  15 led to my question. Yeah.  16 MR. DOSTER: So if we had interpreted  17 it that way, we would already be in the  18 situation that people are concerned about here.  19 JUDGE WOLGAST: But the other part of  20 Judge Reich's question is -- but if that  21 interpretation of tying that to a regulated  22 pollutant is based on the Wegman memo, then how</p>	60	
59	<p>1 is that currently constrained?  2 MR. DOSTER: I don't agree that -- I  3 don't think it's based on the Wegman memo. I  4 think it's similar. I agree that --  5 JUDGE REICH: Is it based on the same  6 reasoning as the Wegman memo?  7 MR. DOSTER: It's a similar rationale.  8 JUDGE REICH: Okay.  9 MR. DOSTER: I don't know that it's  10 identical in the sense that -- you know, the  11 Wegman memo as I read it deals with -- it deals  12 clearly with Title 5, and the question of  13 Title 5 applicability. But it was the same kind  14 of question. If we read this a certain way,  15 we're going to subject a number of pollutants to  16 Title 5 -- or sources to Title 5 -- that aren't  17 even subject to applicable requirements under  18 Title 5. That --  19 JUDGE REICH: And you have conceded  20 that to the extent that the Wegman memo dealt  21 with the issue of how to interpret what an air  22 pollutant is, that's no longer really good law.</p>	<p>1 MR. DOSTER: I have conceded it at  2 oral argument. I think I've been a little more  3 cautious in my briefs, but I think in fact the  4 last time I appeared before you, I did concede  5 that.  6 But -- you know, I'm not sure  7 that -- I don't concede that necessarily, we  8 don't have the discretion to consider an  9 additional narrowing approach in Title 5,  10 given the particular consequences of --  11 JUDGE REICH: Well, but --  12 MR. DOSTER: The ruling.  13 JUDGE REICH: But what about in the  14 context of PSD, which is the case before us?  15 MR. DOSTER: In PSD, for the reasons I  16 laid out, I think there is -- you know, even if  17 one takes the view that there's a literal  18 meaning here that we can't depart from, under  19 the principles of (inaudible) of the de minimis  20 or administrative convenience and those kinds of  21 things, we certainly would have the ability to  22 make the program manageable and to focus on the</p>	61

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1 MR. DOSTER: It's a discretion to  
2 interpret subject to regulation, not necessarily  
3 keyed on what is the meaning of the term "air  
4 pollutant," but in terms of --  
5 JUDGE REICH: No, exactly.  
6 MR. DOSTER: What is --  
7 JUDGE REICH: But I mean, is there an  
8 analogous discretion to --  
9 MR. DOSTER: To narrow or to broaden?  
10 JUDGE REICH: To narrow it to make the  
11 program administratively more workable.  
12 MR. DOSTER: Certainly. I certainly  
13 agree. I mean, that is the fundamental premise  
14 of our argument. And we have historically done  
15 that. I don't think -- you know, it was to look  
16 at the pollutants that the administrator had  
17 determined were -- either had found an  
18 endangerment for, or that the Congress had  
19 specifically and clearly designated are  
20 pollutants that we needed to regulate. And  
21 those were the things that we were focusing on.  
22 So yes, our discretion is to focus

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1 on the pollutants, that there's been an  
2 official determination that they need to be  
3 regulated. And in this case, we don't have  
4 that. We have a peripheral provision not  
5 even incorporated into the Clean Air Act,  
6 which has been -- you know, equated to an  
7 elephant in the mousehole in the words of  
8 *Whitman v. EPA* decision.  
9 JUDGE REICH: If something is made  
10 subject to the enforcement provisions of the  
11 Clean Air Act, why isn't that sufficient to make  
12 it subject to regulation under the Act even if  
13 the requirement springs from a different  
14 statute? Isn't enforceability really a key  
15 component of being subject to regulation?  
16 MR. DOSTER: In theory, I guess I  
17 can't dispute that. But the words that Congress  
18 used were "subject to regulation" under the  
19 Clean Air Act, or under this chapter, as  
20 promulgated in the codes.  
21 JUDGE REICH: But can't regulation  
22 include enforcement?

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1 MR. DOSTER: Certainly regulation  
2 includes enforcement --  
3 JUDGE REICH: So could you read it,  
4 then, as one of the ways of reading it as  
5 subject to enforcement under the Clean Air Act,  
6 which this seems to be?  
7 MR. DOSTER: Enforcement -- I'm not  
8 sure I follow. I mean, I think of enforcement  
9 in the context of enforcing a clearly applicable  
10 requirement, a restriction, an emissions limit  
11 that somebody has failed to meet. That's what I  
12 think of enforcement to mean. You're talking  
13 about legal enforceability, enforceable as a  
14 matter of law?  
15 JUDGE REICH: Yeah, I'm saying if  
16 regulation includes enforcement, then can I read  
17 that "subject to regulation under the Act" to  
18 include something that is subject to enforcement  
19 under the Act? Which this appears to be,  
20 because it relies on the Air Act for its  
21 enforcement mechanism.  
22 MR. DOSTER: If you take the

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1 dictionary meaning of the term "regulation" that  
2 we've discussed in this case, I don't think you  
3 can read that to be enforcement. You can read  
4 "regulation" to mean enforcement. You can read  
5 regulation to mean, as the Petitioners have, to  
6 mean a rule promulgated and published in the  
7 Code of Federal Regulations. And if that's what  
8 you mean by enforcement under the Act, you know,  
9 it could be the case. But this particular  
10 monitoring provision as we specified is based on  
11 Section 821, a provision that is not under the  
12 Act.  
13 JUDGE REICH: Do you agree with  
14 Deseret's argument that if 821 regulates  
15 anything, it regulates facilities rather than  
16 pollutants?  
17 MR. DOSTER: Yes. I'm not sure I  
18 completely agree with it, but I think the  
19 general tenor of it I think is correct. Our  
20 interpretation of "regulation" as to control by  
21 rule or restriction -- or to, if you read the  
22 dictionary -- the Webster's dictionary, to

1 direct or to -- they're directed -- the facility  
2 is directed to compile and report its emissions.  
3 So -- but the emissions themselves are not  
4 regulated. They're not controlled. The  
5 emissions -- it's simply an  
6 information-gathering requirement. So yes,  
7 there's no -- the facility is required to report  
8 and subject to, in some sense, a control, a  
9 requirement to report, but not to actually limit  
10 its emissions.

11 JUDGE WOLGAST: Do you agree that if  
12 the facility refuses to report that that refusal  
13 is enforceable, that EPA can then take action?

14 MR. DOSTER: Certainly, it's -- I  
15 mean, it's enforceable under the regulations.  
16 The question is really whether that's  
17 enforceable as the implementation of the Clean  
18 Air Act.

19 JUDGE WOLGAST: I'm struggling  
20 with -- I mean, looking at how these enforcement  
21 provisions fit together in terms of Section 412  
22 and Section 414, which has been argued is -- and

1 legal basis for it. It was the legal reason  
2 that that is our organic authority to promulgate  
3 the regulations that required it.

4 JUDGE WOLGAST: Have you ever done  
5 that? Have you ever enforced this provision?

6 MR. DOSTER: I am not aware of that.  
7 I don't know one way or the other. I don't have  
8 those details.

9 JUDGE WOLGAST: So you're saying you  
10 wouldn't use Section 113 of the Act to invoke a  
11 court's jurisdiction to require monitoring?

12 MR. DOSTER: That -- it's a good  
13 question. I don't know. We haven't directly  
14 faced it, I think, under the interpretation that  
15 I'm advocating today. I think we would be  
16 hesitant to do so.

17 JUDGE REICH: In terms of the  
18 implications of what you're asking us to decide,  
19 75.5 indicates, as you well know, that a  
20 violation of the regulations in Part 75, which  
21 includes carbon dioxide, is a violation of the  
22 Act. And I know in your briefs you've

1 do you agree is the mechanism by which it would  
2 become enforceable under the Act?

3 MR. DOSTER: There's -- if I could  
4 actually get the specific language -- there's a  
5 reference -- as I understand it, there's a  
6 reference to a provision which is not actually  
7 that provision.

8 The drafters of the Code have  
9 interpreted that to have been Congress'  
10 intent, but there was a mistake in the  
11 citation. But as I recall the language, I  
12 believe it says that it shall be enforceable  
13 not under that provision, but in the same  
14 manner as something under that provision. I  
15 need to grab the specific language, if --

16 JUDGE WOLGAST: So I guess that -- I  
17 understand your point. But that leads me to  
18 ask, so how is it enforceable? How do you  
19 invoke the jurisdiction of the court?

20 MR. DOSTER: Under the Public Law  
21 101-549, which is the law under which the  
22 requirement was created. And so that is the

1 acknowledged that in some of the documents to  
2 date, you've been a little imprecise in using  
3 that reference to the Act as it relates to 821.  
4 Would you say that that is no longer an accurate  
5 statement as it relates to carbon dioxide  
6 monitoring, that it's no longer a violation of  
7 the Act under 75.5?

8 MR. DOSTER: I would note first -- and  
9 I'll address your question, but I think this is  
10 relevant to it -- the Act as used in 75.5 is  
11 basically incorporating the phrase that is used  
12 in 75.1(a), which is where we say "Sections 412  
13 and 821 of the Clean Air Act as amended by  
14 Public Law 101-549 (the Act)."

15 So to the extent -- what I'm saying  
16 is that we were wrong in 75.1(a) in saying  
17 821 of the Clean Air Act. We should have  
18 been more precise, because it isn't part of  
19 the Clean Air Act -- and said 821 of Public  
20 Law 101-549.

21 But I'm not saying that that  
22 citation in 75.5 is wrong, because it's

1 referring back to 821. And so it is a  
2 violation of 821.

3 JUDGE REICH: To the extent that you  
4 cited I think both 412 of the Clean Air Act and  
5 821 as authority for the Part 75 provisions, was  
6 the authority for the carbon dioxide provision  
7 solely 821?

8 MR. DOSTER: That is our position,  
9 yes.

10 If I could move on, I'd like to  
11 respond to one point that Petitioners made  
12 with respect to the Alabama Power decision,  
13 because I think it's so illustrative of the  
14 liberties that the Petitioners are taking  
15 with the authorities that they're citing in  
16 this case, and that the Board should be  
17 cognizant of it.

18 They cite to footnote 131 of Judge  
19 Leaventhall's opinion in Alabama Power for  
20 the notion that it's still possible for a  
21 pollutant, which -- so I can get the exact  
22 language, "does not present substantial

1 promulgate a 111 NSPS for those excluded  
2 pollutants, they would become subject to  
3 regulation under the BACT analysis.

4 So this footnote does nothing to  
5 support the Petitioners' argument, and it  
6 completely confirms our position here today.

7 Furthermore, they cite the  
8 legislative history in the -- you know, and  
9 argue that there was an intent to control CO2  
10 omissions from the legislative history. But  
11 again, they quote selective provisions, and  
12 you don't -- read the whole thing -- if you  
13 read the whole thing in context, it's very  
14 clear that the only purpose of the drafters  
15 of that amendment was for  
16 information-gathering.

17 They say at one point, "we can  
18 hardly expect to make responsible decisions  
19 about controlling these emissions if we fail  
20 to take the necessary steps to prove our  
21 understanding of the magnitude and rate of  
22 increase in these emissions."

1 public health or welfare concerns to be  
2 regulated under the Act."

3 This is demonstrably out of context  
4 and completely inconsistent with the  
5 footnote. The footnote is not even in the  
6 part of the opinion that relates to "subject  
7 to regulation" and the BACT requirement.  
8 It's with respect to a fugitive missions (?)  
9 part of the opinion.

10 What it says is that Congress -- or  
11 that EPA might have the discretion to exclude  
12 particulates of a size or composition  
13 determined to not to present substantial  
14 public health or welfare concerns from the  
15 NACs (?) for particulates.

16 So it doesn't say what they're  
17 saying it says, that it stands for the  
18 proposition that the BACT analysis applies to  
19 a pollutant that does not present substantial  
20 public health or welfare concerns. Further  
21 down in that footnote, if you read it, it  
22 says quite clearly that if EPA were to

1 They're not controlling it here.  
2 They clearly indicate that. Their intent is  
3 to gather information in anticipation of  
4 potential control at some point at a later  
5 date.

6 JUDGE REICH: Could the BACT process  
7 facilitate gathering information even if you  
8 conclude at the end of that process that there  
9 really is no control that's appropriate for  
10 BACT?

11 MR. DOSTER: It certainly -- it could  
12 contribute to gathering information, I can't  
13 contest that if you were to do the analysis.  
14 But that would -- you're -- I'm sorry. The  
15 premise of your question is, you would go  
16 through the analysis and then it would lead to  
17 no control?

18 JUDGE REICH: Potentially.

19 MR. DOSTER: I'm not sure I see the  
20 point of the analysis at that degree and --

21 JUDGE REICH: But I mean, that may not  
22 be a preordained result. All I'm saying is that

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1 in addition to the monitoring data that 821  
2 clearly contemplates, potentially you would get  
3 additional useful information by going through a  
4 BACT review, which may ultimately lead you to  
5 conclusion that at the moment, there is no  
6 control that's appropriate, but it still adds to  
7 your knowledge about CO2 and potential controls  
8 of CO2, and otherwise sort of strengthens your  
9 ability to ultimately make a determination  
10 relative to whether some further control of CO2  
11 is appropriate.

12 MR. DOSTER: We don't have to go  
13 through a BACT analysis to develop that  
14 information.

15 I don't quite follow why that would  
16 be the hook. I mean, we could do that on our  
17 own. In fact, I think we already are. I  
18 mean, we're working very diligently on an  
19 advance notice of proposed rulemaking.

20 JUDGE REICH: But it could be a way to  
21 force that to be done as opposed to relying on  
22 just Agency discretion to decide to do it or not

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1 do it.

2 MR. DOSTER: I suppose if one thought  
3 that's what Congress intended, that you could  
4 read it as being forced to be done that way.  
5 But the BACT provision -- the central word in  
6 the BACT provision is an "emissions limitation."  
7 So the BACT provision's intent is  
8 to establish -- it's a technology-forcing  
9 provision to establish a technology-based  
10 emissions limitation.

11 So the gathering of information  
12 relative to that doesn't seem to me to be  
13 consistent with the purpose of the BACT  
14 provision. While this could be an ancillary  
15 benefit under your theory here, it just  
16 doesn't seem like that's what -- Congress  
17 intended us to go through the exercise just  
18 to gather information. Intended us to go  
19 through the exercise to establish emissions  
20 limits and to control emissions on pollutants  
21 that somebody had determined there was a  
22 danger for public health and welfare from, in

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1 an official capacity.

2 JUDGE WOLGAST: Could I clarify  
3 something you said a couple of minutes ago? Are  
4 you saying that monitoring and reporting  
5 requirements can't be interpreted to be  
6 "regulation" within the meaning of Section 165?  
7 MR. DOSTER: Yes, that's our central  
8 position, and I think it has been in this case.  
9 You're asking if it can't be interpreted that  
10 way?  
11 No, we're not saying this is a  
12 Chevron One case in favor of our  
13 interpretation. We're saying that there is  
14 some ambiguity and that the provision is  
15 susceptible to more than one interpretation.  
16 We've said that in our briefs, that there are  
17 different meanings of the term "regulation,"  
18 Petitioners have cited to one. We've cited  
19 to another, which we think is a commonly  
20 accepted and clearly understood meaning, and  
21 that our interpretation is therefore clearly  
22 permissible.

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1 It's not clearly erroneous for us  
2 to have applied an established dictionary  
3 meaning of the term.

4 JUDGE WOLGAST: About your  
5 interpretation, am I correct that the preamble  
6 to the 2002 rule doesn't specifically address  
7 the catch-all provision, or explain how the  
8 Agency sees the scope of that provision?  
9 MR. DOSTER: It does not explicitly  
10 articulate our interpretation of that provision,  
11 to my knowledge, in the preamble. I think what  
12 we've argued is that the list that was  
13 contemporaneously published with that is an  
14 indication of what our interpretation was, that  
15 that list was not the only indication of our  
16 interpretation. That in addition, two of the  
17 Board's opinions -- the Cannon memo, the Wegman  
18 memo -- the original interpretation of  
19 Administrator Kosloff (?) to focus on pollutants  
20 that were subject to controls. All of that  
21 collectively together, if you take all of that  
22 history, it's very clear what our position has

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1 been.

2 I will acknowledge that in the 2002

3 final rule, we did not articulate this in the

4 way the Petitioners would have liked for us

5 to have done so.

6 But we made clear in 1996 which

7 pollutants we thought were covered, and we

8 were adding pollutants and subtracting

9 pollutants from that list based on the 1990

10 amendments.

11 So if anybody at that time thought

12 we should have been covering CO2, there was

13 clear notice and opportunity for them to

14 raise this issue with us at that time. And

15 at that time, we would have then had the

16 opportunity to respond to the comment and

17 articulate the interpretation that we have

18 long been following that is apparent from all

19 these other activities.

20 JUDGE WOLGAST: On a related point to

21 what you just said, I read your brief to say

22 that this is an improper forum for this argument

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1 by Sierra Club. That they in fact are barred

2 from objecting at this point to EPA's

3 interpretation of a regulated NSR pollutant.

4 But I am somewhat puzzled by -- if they had

5 brought a challenge to the 2002 rulemaking, what

6 specifically would they have challenged? What

7 would that challenge have looked like?

8 MR. DOSTER: They would have

9 challenged the fact that we didn't list the

10 pollutant CO2, or we didn't establish a

11 significant emissions rate for CO2, which is

12 what we do for every pollutant that we consider

13 regulated. And that we should have been

14 covering the pollutant under the program but

15 weren't taking the steps necessary to do that.

16 JUDGE WOLGAST: But it also --

17 MR. DOSTER: You would have had to

18 comment on it first. First off, they would have

19 had to comment on it, I believe. If they

20 thought we should be regulating CO2 under this

21 program, they would have commented on it and we

22 could have addressed this question. If they had

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1 this legal theory, this plain meaning that we've

2 all been missing -- if that had been presented

3 to us or -- we would have had the opportunity to

4 articulate this and respond. But instead, they

5 wait until we apply it in a permit proceeding.

6 There's two board opinions that say

7 it's not -- a regulated pollutant. There's

8 memos from the general counsel indicating

9 that this is -- that we have -- the position

10 that the Supreme Court ultimately

11 adopted -- yet they wait until a permitting

12 decision -- when a region reasonably relies

13 on this history and determines that CO2 is

14 not subject to regulation, that the Supreme

15 Court decision, the intervening decision, did

16 not change that interpretation -- it simply

17 addressed the question of whether CO2 was an

18 air pollutant. We respond to a comment

19 raising the issue for the first time in a

20 permit proceeding and we address it.

21 So perhaps this is the appropriate

22 time. And maybe you have trouble with our

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1 argument that they were barred at that time.

2 But -- you know, they couldn't have even

3 raised it then, because they didn't even

4 comment on it in the 2002 rulemaking.

5 So we didn't even have an

6 opportunity to address the issue and

7 articulate what had -- what the evidence

8 shows we had clearly been doing all along,

9 whether -- it may not have been exactly

10 expressly articulated in one place with one

11 pretty red bow on it, but it was clear in the

12 progression of our behavior over time what we

13 were doing and how we have interpreted the

14 Act.

15 JUDGE STEIN: I have a couple

16 questions. I wanted to go back to the

17 monitoring and 821 and the Part 75 regulations.

18 Following your line of thinking, am I correct in

19 understanding that you're saying some of the

20 monitoring provisions under the regulations in

21 Part 75 are not enforceable under Section 113 of

22 the Clean Air Act? Is that a correct

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1 understanding?

2 MR. DOSTER: I am saying that's

3 consistent with our interpretation advocated to

4 you here today that that would not be

5 appropriate. We have not made that judgment,

6 and I'm not in a position to weigh in on that in

7 an a definitive way. But the extent --

8 JUDGE STEIN: What's the ramification

9 of that? I mean, where does that stop? I mean,

10 you've got regulations that are promulgated

11 under both -- you know, the authority of the

12 Clean Air Act and 821. They're in a part that

13 typically is enforceable under 113, the

14 principal enforcement mechanism under the Clean

15 Air Act. What else might not be enforceable

16 under the Clean Air Act if we're to accept your

17 821 theory?

18 MR. DOSTER: That's hard to answer

19 because I don't know. I mean, an example would

20 be the 4042 acid precipitation study that we

21 were required to do, which is under a provision

22 that's also not promulgated in the Act.

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1 JUDGE STEIN: So there would be

2 no -- so in other words, if EPA didn't do that

3 study, there would be no remedy for someone to

4 bring suit to compel EPA?

5 MR. DOSTER: In fact, no. Because, in

6 fact, they did bring suit to compel EPA to do

7 that study, or at least question the study that

8 we did. The New York v. Browner case that's

9 been cited to you in this case was an action

10 for -- I think it was an unreasonable delay case

11 or some action to enforce Section 404.

12 JUDGE STEIN: Did the Agency in that

13 case say that there was no authority on the part

14 of the citizens to bring that suit because it

15 wasn't part of the Clean Air Act?

16 MR. DOSTER: We did not argue that.

17 In the case, in fact, that opinion is very

18 limited in its analysis of that issue. So to my

19 knowledge, I don't think we argued that specific

20 issue. We I believe argued that we had done the

21 study, that we had done an appropriate study. I

22 think the question was whether there was

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1 something missing from the study. We had taken

2 action, and I think the question was whether

3 part of the study was incomplete.

4 JUDGE STEIN: Isn't there a narrower

5 way to look at this with potentially less

6 broad-reaching consequences, which is that by

7 the act of promulgating the regulations under

8 the authority of 821 in the Act, they in fact

9 became subject to the enforcement authority of

10 the Clean Air Act?

11 MR. DOSTER: It's not -- this is not

12 the central premise of my argument. This is one

13 piece that -- if you were to conclude that a

14 monitoring provision is regulation, this would

15 not be under the Act. But my primary argument

16 and our primary position does not depend on

17 this. Our primary position is that "subject to

18 regulation" means subject to actual control of

19 emissions.

20 JUDGE STEIN: If that was Congress'

21 intent, how do you respond to Petitioner's

22 argument that Congress could have used those

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1 words in the statute?

2 MR. DOSTER: We've addressed this in

3 our brief. Congress could just as easily have

4 said "subject to a regulation" or "subject to

5 regulations," which would be consistent exactly

6 with their meaning. The term "regulation" as

7 we've interpreted it under what they allege is a

8 narrow interpretation -- which is in fact quite

9 broad -- we have interpreted "regulation" more

10 broadly than the definition of the term

11 "regulation" because we interpret it to cover

12 Title 5 pollutants which are subject to import

13 and production restrictions which do not fit

14 within the definition of a continuous limitation

15 on emissions, as defined in the definition of

16 emissions limitations.

17 So we have given that provision a

18 broader construction than emissions

19 limitation. So if Congress had intended it

20 to be narrower, they'd be narrowing it, and

21 would be excluding ozone-depleting substances

22 from the program.

86	<p>1 JUDGE REICH: Thank you, Mr. Doster.</p> <p>2 MR. RUSSELL: Good morning, Your</p> <p>3 Honor.</p> <p>4 JUDGE REICH: Good morning.</p> <p>5 MR. RUSSELL: Jim Russell, Winston &amp;</p> <p>6 Strawn, for Deseret.</p> <p>7 I thought with my 10 minutes, that</p> <p>8 I would first thank you for expeditiously</p> <p>9 scheduling this oral argument considering the</p> <p>10 full briefing. And obviously, the Permittee</p> <p>11 looks forward to an early decision, but we</p> <p>12 thank you for the schedule that we have and</p> <p>13 the diligence with which you've looked at</p> <p>14 this.</p> <p>15 I'd like to go back to Christian</p> <p>16 County for a moment since we're talking about</p> <p>17 undefined phrases. You'll recall in</p> <p>18 Christian County, we have the phrase</p> <p>19 "reasonably ascertainable" or "reasonably</p> <p>20 available." And the Board applied a common</p> <p>21 sense test to what that phrase meant.</p> <p>22 We obviously like our brief. We</p>	88	<p>1 regulated pollutant. And EPA is required to</p> <p>2 impose a carbon dioxide BACT emission limit</p> <p>3 in the Bonanza PSD permit."</p> <p>4 That seems backward to me. I don't</p> <p>5 know how you can regulate a pollutant that</p> <p>6 isn't a pollutant. But let's go ahead and</p> <p>7 look at Petitioner's reply brief. In --</p> <p>8 JUDGE STEIN: Isn't the argument that</p> <p>9 it was a pollutant, but until the Supreme Court</p> <p>10 decided that it was a pollutant all along -- but</p> <p>11 that until the Supreme Court decided that issue,</p> <p>12 there was a dispute about it?</p> <p>13 MR. RUSSELL: Right.</p> <p>14 JUDGE STEIN: But that in the -- I</p> <p>15 mean, I don't imagine the Supreme Court</p> <p>16 suggesting suddenly that the Act was enacted in</p> <p>17 2008 or --</p> <p>18 MR. RUSSELL: That's right.</p> <p>19 JUDGE STEIN: Or 2007, excuse me. But</p> <p>20 it's been a pollutant all along.</p> <p>21 MR. RUSSELL: And so the Supreme Court</p> <p>22 said -- since you have the authority to regulate</p>
87	<p>1 like the law that we have cited. But I'd</p> <p>2 like to try to apply a common sense test to</p> <p>3 some of Petitioner's statements here in its</p> <p>4 overall over-reaching argument that carbon</p> <p>5 dioxide has always been regulated, it just</p> <p>6 hasn't been a pollutant.</p> <p>7 If you -- and that at the end of my</p> <p>8 10 minutes, I'd like to just ask you briefly</p> <p>9 what has changed since Christian County and</p> <p>10 what has changed since Massachusetts v. EPA.</p> <p>11 But last time, Judge Wolgast asked me what</p> <p>12 our best argument was, and I'd like to focus</p> <p>13 on Christian County common sense.</p> <p>14 If we look at Petitioner's opening</p> <p>15 brief, page 6, "Carbon dioxide has been</p> <p>16 regulated under the Clean Air Act since 1993,</p> <p>17 when EPA adopted regulations implementing</p> <p>18 Section 821. The Supreme Court then held</p> <p>19 that carbon dioxide and other greenhouse</p> <p>20 gases are pollutants under the Clean Air Act.</p> <p>21 Now having been definitively ruled a</p> <p>22 pollutant, carbon dioxide is accordingly a</p>	89	<p>1 it, you really ought to consider an endangerment</p> <p>2 finding to see whether it poses health risks.</p> <p>3 JUDGE REICH: That clearly is relative</p> <p>4 to a different statutory scheme. I just -- just</p> <p>5 to make sure I understand kind of the broader</p> <p>6 position of Deseret -- the Agency clearly takes</p> <p>7 the position that there was more than one</p> <p>8 possible interpretation to "subject to</p> <p>9 regulation" --</p> <p>10 MR. RUSSELL: Right.</p> <p>11 JUDGE REICH: But the one they chose</p> <p>12 was the best and clearly permissive, and one</p> <p>13 that has a long history and we ought to accept.</p> <p>14 Deseret talks a lot about plain meaning.</p> <p>15 MR. RUSSELL: Right.</p> <p>16 JUDGE REICH: Do you disagree with the</p> <p>17 Agency that its interpretation is only</p> <p>18 permissive, or do you believe that there was</p> <p>19 only one interpretation the Agency could have</p> <p>20 taken?</p> <p>21 MR. RUSSELL: No, there's not only one</p> <p>22 interpretation the Agency could have taken. But</p>

90	<p>1 the question is, of course, as you know, whether</p> <p>2 the one it took was clearly erroneous. And we</p> <p>3 believe that it was not. We applied for a</p> <p>4 permit --</p> <p>5 JUDGE REICH: Okay.</p> <p>6 MR. RUSSELL: Designed to specs.</p> <p>7 JUDGE REICH: So your reference to</p> <p>8 plain meaning doesn't suggest that there was</p> <p>9 only one permissible interpretation. It does</p> <p>10 recognize the Agency had some discretion in how</p> <p>11 it chose to define --</p> <p>12 MR. RUSSELL: In essence --</p> <p>13 JUDGE REICH: "Subject to regulation?"</p> <p>14 MR. RUSSELL: One of your jobs here,</p> <p>15 of course, not to be taken the wrong way -- is</p> <p>16 to define what is the plain meaning of "subject</p> <p>17 to regulation" under this chapter. And I'm</p> <p>18 suggesting that the Christian County test of</p> <p>19 common sense that you used for "reasonably</p> <p>20 available" and "reasonably ascertainable" is a</p> <p>21 good candidate.</p> <p>22 If you look at Petitioner's reply</p>	92	<p>1 some basic legal precepts. One of them, of</p> <p>2 course, is that BACT is an emission</p> <p>3 limitation based on maximum degree of</p> <p>4 reduction.</p> <p>5 You raise a good point about</p> <p>6 whether a BACT analysis could lead to a</p> <p>7 no-control just information result. I think</p> <p>8 that's a good question.</p> <p>9 I don't know. But under the</p> <p>10 statute, BACT is an emission limitation.</p> <p>11 Well, how does that logically follow from a</p> <p>12 requirement to monitor? If you have a</p> <p>13 requirement to monitor, it doesn't</p> <p>14 automatically lead to the conclusion there's</p> <p>15 going to be an emission limitation. There</p> <p>16 could even be an increase. It depends on</p> <p>17 what the data reveals. It depends on what</p> <p>18 the science says.</p> <p>19 Their argument ignores the law,</p> <p>20 because of course, Section 165 does not say</p> <p>21 "subject to" being mentioned anywhere. It</p> <p>22 says "subject to regulation under this</p>
91	<p>1 brief page 1, we have another little</p> <p>2 syllogism here that seeks to cover up legal</p> <p>3 and logical defects in this sweeping policy</p> <p>4 agenda that they have. Carbon dioxide is a</p> <p>5 pollutant regulated under the Clean Air Act,</p> <p>6 and they cite Massachusetts for that. Carbon</p> <p>7 dioxide is a pollutant regulated under the</p> <p>8 Clean Air Act.</p> <p>9 Massachusetts didn't say that.</p> <p>10 Therefore, Deseret may not</p> <p>11 construct the proposed facility --</p> <p>12 (Interruption)</p> <p>13 SPEAKER: Sorry.</p> <p>14 MR. RUSSELL: Unless it is something</p> <p>15 subject to the Best Available Control Technology</p> <p>16 for CO2. It's that simple.</p> <p>17 If you would consider a common</p> <p>18 sense approach to an undefined phrase,</p> <p>19 "subject to regulation" under this chapter,</p> <p>20 I'd like you to consider that these sweeping</p> <p>21 syllogisms and -- can I say, sound bites that</p> <p>22 appear so often in these briefs -- ignore</p>	93	<p>1 chapter" and your job is, of course, to</p> <p>2 confirm what the meaning of "regulation" is.</p> <p>3 But I would offer you a couple of</p> <p>4 common sense analogies in the hope that it's</p> <p>5 helpful. And this is apart from the briefs,</p> <p>6 but consistent with them.</p> <p>7 The Petitioner would have you</p> <p>8 believe that to require an automobile</p> <p>9 manufacturer to install a speedometer has</p> <p>10 thus rendered speed subject to regulation.</p> <p>11 The Petitioner would have you believe that to</p> <p>12 require an airplane manufacturer to install</p> <p>13 an altimeter has thus rendered altitude</p> <p>14 subject to regulation. And you can go</p> <p>15 further down the list and use devices like</p> <p>16 blood pressure monitors or temperature</p> <p>17 devices.</p> <p>18 But that's why their 821 argument</p> <p>19 doesn't work, is because -- go ahead.</p> <p>20 JUDGE REICH: If you were required to</p> <p>21 install a speedometer and then you were required</p> <p>22 to report the data from the speedometer, doesn't</p>

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1 that at least bring you closer to the concept of  
2 regulation?  
3 MR. RUSSELL: Yes.  
4 JUDGE REICH: I mean, I'm not saying  
5 whether it gets you there or not. I'm saying  
6 it's not a precise analogy just to talk about  
7 installation without also talking about the  
8 obligation to report.  
9 MR. RUSSELL: But speed has not yet  
10 been limited. And so the question is, what is  
11 BACT? Is it a speed limitation, as the statute  
12 says and as the Agency has construed for many  
13 decades in their supposed house of cards  
14 regulatory philosophy?  
15 JUDGE WOLGAST: But to go to your  
16 common sense argument --  
17 MR. RUSSELL: Yes, ma'am.  
18 JUDGE WOLGAST: If Deseret or any  
19 other coal-fired utility is required to obtain  
20 data and report that data -- that it's expending  
21 personnel, costs, and other costs, wouldn't they  
22 consider themselves, in a commonsensical view,

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1 regulated?  
2 MR. RUSSELL: It could. The question  
3 is, what do you mean by "regulated?"  
4 We say limited. We say controlled.  
5 To require a monitoring exercise by  
6 regulation is to be regulated. But is that  
7 what BACT means? Is that what the statute  
8 means? And if so, why doesn't 821 appear on  
9 the face of the statute? Could it be that  
10 Congress actually anticipated that its 821  
11 regulations, if inserted onto the face of the  
12 Act, would upset the entire architecture of  
13 the statute, including such things as the NAC  
14 increments and statutory -- major source  
15 thresholds.  
16 The problem, again, with an  
17 over-reaching argument such as they have is  
18 that it can lead to some really strange  
19 results, and some of that was talked about  
20 earlier today. I'd like to reiterate it,  
21 because it actually appears in their reply  
22 brief on page 8. This came up today during

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1 the first oral argument.  
2 Respondents and their amici  
3 expressed a concern about the large number of  
4 small sources -- apartment buildings,  
5 hospitals, fast food restaurants, that may  
6 have to go through the PSD process if CO2 is  
7 a regulated pollutant. Your Honor alluded to  
8 this earlier.  
9 Not only can EPA go to Congress for  
10 a legislative solution to this, but the Board  
11 should not allow Bonanza or any other source  
12 pouring millions of dollars of CO2 into the  
13 air to avoid regulation by hiding behind the  
14 local Dunkin' Donuts.  
15 Another snappy sound bite, but look  
16 what they just said. I think they said that  
17 it already applies to all those millions of  
18 small sources, and that what EPA ought to be  
19 doing is seeking a legislative fix.  
20 JUDGE REICH: Okay, thank --  
21 MR. RUSSELL: If they didn't say that,  
22 as you suggested before, it certainly could go

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1 that way.  
2 JUDGE REICH: Thank you, Mr. Russell.  
3 I have -- before we let you go, a question on  
4 something we really haven't talked about,  
5 because I don't want to misinterpret something  
6 you said in your brief.  
7 One argument that has been made is  
8 wholly apart from the 821 argument that  
9 carbon dioxide is subject to regulation  
10 because it's regulated under one or more  
11 state implementation plans.  
12 And I note that in the brief you  
13 filed -- and this was -- I think the brief  
14 when you first intervened was before we  
15 granted review. You're talking about the  
16 different terms in terms of emission  
17 standards, equipment standards, practice  
18 standards, and the sort of diversity of  
19 different terms that could be used.  
20 And there's a sentence that says:  
21 "Of course, Congress could have included a  
22 long list of every type of measure for

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<p>1 controlling emissions and every corresponding  2 section of the Act (although it still might  3 have needed to list provisions and state  4 implementation plans that control emissions  5 but are not specifically spelled out in the  6 Act)."</p> <p>7 By referring to state  8 implementation plans in that part of your  9 argument, are you suggesting that in fact  10 something could become subject to regulation  11 if it is regulated only in the state  12 implementation plan?</p> <p>13 MR. RUSSELL: I don't see how that  14 would make sense.</p> <p>15 JUDGE REICH: So that wasn't the  16 intent of your reference to state implementation  17 plans?</p> <p>18 MR. RUSSELL: I don't see how that  19 would make sense. I don't see how Region 8  20 would have to incorporate a BACT requirement  21 just because Wisconsin by itself had addressed  22 the issue somewhere somehow.</p>	<p>1 lot this morning about what does "subject to  2 regulation" mean. Now I'd like to focus on the  3 next prong of 165: "Under this Act." And what  4 does "under this Act" mean, and does Section 821  5 fall within the Clean Air Act?</p> <p>6 UARG's answer to that is no, it  7 does not. And that answer is supported by  8 the text of 821 itself, by the legislative  9 history of Section 821, and also by the  10 legislative history of the 1990 amendments  11 themselves.</p> <p>12 One of the things that is  13 noticeable when you read the briefs in this  14 case is that all the legislative history  15 points towards this conclusion, that Congress  16 never intended for Section 821 to have the  17 effect that Petitioners would ascribe to it.</p> <p>18 Petitioners -- Sierra Club earlier  19 read a passage from the legislative history  20 that they say show that Congress had in fact  21 contemplated emission reductions. In fact,  22 that quote was taken out of context, and I'd</p>
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<p>1 JUDGE REICH: I just wanted to make  2 sure that that wasn't your intention, given the  3 way you phrased it.</p> <p>4 MR. RUSSELL: And then lastly, I would  5 ask you, because my time is up, what has changed  6 since Christian County? Christian -- the Board  7 commented on Deseret, didn't on Christian  8 County. Extracted the Sierra Club's public  9 comments --</p> <p>10 JUDGE REICH: Right. I think we're  11 over time, Mr. Russell, thank you very much.</p> <p>12 MR. RUSSELL: I thank you for your  13 attention.</p> <p>14 JUDGE REICH: Okay. And UARG.</p> <p>15 MS. WOOD: Good morning. I have a bit  16 of laryngitis; it's actually much better than it  17 was a few days ago. If you can't hear me,  18 please let me know.</p> <p>19 JUDGE REICH: We're doing fine.</p> <p>20 MS. WOOD: The Utility Air Regulatory  21 Group would like to thank the Board for this  22 opportunity to present argument. We've talked a</p>	<p>1 like to read the entire passage from the  2 legislative history to you.</p> <p>3 This is on page 2987 of the  4 legislative history. This is a statement by  5 Congressman Moorhead, one of the sponsors of  6 the amendment.</p> <p>7 "The Cooper-Moorhead amendment will  8 also give us a head start if and when we need  9 to take steps to reduce our carbon dioxide  10 emissions. By establishing an early record  11 of carbon dioxide emissions for our domestic  12 utility companies, we will put the United  13 States in a position to take credit for its  14 efforts to control emissions. This is an  15 important point. What I hope to achieve with  16 this amendment is the elimination of the  17 possibility that U.S. utilities will reduce  18 CO2 emissions as a consequence of compliance  19 with these Clean Air Act amendments and not  20 get credit for these reductions."</p> <p>21 Importantly, the first sentence of  22 the passage I wrote, Congressman Moorhead</p>

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1 says that it would give a head start if and  
2 when we need to take steps to reduce CO2.  
3 JUDGE REICH: But what's the  
4 significance of the word "reduce"? I mean, in  
5 my mind, when you talk about reducing something,  
6 you have a certain level and you're talking  
7 about bringing that level down. If you're  
8 talking about a new source that at the moment  
9 isn't contributing anything, then regulating  
10 what that new source puts out I don't think  
11 would be viewed as reducing. So I'm not sure  
12 that language necessarily translates into  
13 regulating sources that at the moment aren't  
14 emitting anything because they're not yet  
15 constructed.  
16 MS. WOOD: But if you think about  
17 logically what it is that he's saying, the if  
18 and when, if you take Petitioner's position, the  
19 if would no longer be an if. We would know that  
20 under their interpretation, PSD and BACT was  
21 about to apply, and we would even know when. We  
22 would know that it would be 18 months after the

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1 enactment of the Clean Air Act amendments.  
2 And I do see your point about -- is  
3 a reduction -- you know, is that different  
4 from what a new source would do? And I  
5 think -- you know, when Congress is speaking,  
6 sometimes they use the words "reduce" and  
7 sometimes they talk about regulation, and I  
8 think they're using those interchangeably,  
9 and they're thinking that a regulation is a  
10 form of reduction. And indeed, if you think  
11 about -- you know, PSD and BACT applying to  
12 just a new source, it is in fact a form of a  
13 reduction because it's less than it would  
14 have been without the BACT being applied.  
15 JUDGE WOLGAST: That assumes, though,  
16 that the end of the analysis is that there is a  
17 viable technology, or the other criteria are met  
18 to install -- to reduce BACT emissions.  
19 MS. WOOD: Right, assuming for the  
20 sake of argument. But I think that -- you know,  
21 I don't know whether or not that technology  
22 exists, but I think -- you know, for the sake of

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1 argument, assuming that it would. Otherwise,  
2 you know, it wouldn't. But at some point in the  
3 future, you could see whether it exists now or  
4 not, whether it existed at the time when  
5 Congress was contemplating this. It's  
6 certainly -- you know, probable to think that it  
7 would exist at some point.  
8 And what is very clear when you're  
9 looking at the legislative history is that in  
10 dealing with carbon dioxide emissions,  
11 Congress took great pains to be sure that it  
12 was never doing anything that could be  
13 construed as a regulation, or anything that  
14 would impose mandatory emission reductions at  
15 that time on carbon dioxide emissions.  
16 If you take what Petitioners are  
17 saying, then Section 821 would have in fact  
18 compelled that either in 1990 or in 1993,  
19 depending on whether you believe it would  
20 have compelled it upon the enactment of the  
21 Clean Air Act amendments or once EPA  
22 promulgated the regulations for monitoring.

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1 JUDGE STEIN: Do you agree with EPA  
2 that by virtue of the fact that the Part 75  
3 regulations are at least in part under 821, that  
4 those regulations are unenforceable under  
5 Section 113 of the Act?  
6 MS. WOOD: No, I don't. When you look  
7 at 821 itself, the last sentence of Subsection A  
8 of Section 821 says -- and I'm going to put in  
9 the correct section numbers; they're wrong in  
10 the original text: "The provisions of  
11 Section 412(e) of Title 4 of the Clean Air Act  
12 shall apply for purposes of this Section in the  
13 same manner and to the same extent as such  
14 provision applies to the monitoring and data  
15 referred to in Section 412."  
16 That provision -- in doing that,  
17 what Congress did was tie it to Subsection E  
18 of 412, which is the prohibition against  
19 operating a source in violation of the  
20 monitoring requirements. And it's through  
21 that last sentence that it ties it into the  
22 enforcement provisions of the Act.

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1 JUDGE WOLGAST: So then it's your  
2 position that Section 414 and Section 113 would  
3 apply to any violations of the monitoring  
4 provisions?  
5 MS. WOOD: To a violation of the  
6 monitoring? Yes.  
7 JUDGE WOLGAST: And let me just ask  
8 you a question about that, because -- I mean, in  
9 Section 414, it says it's unlawful for any  
10 person subject to the subchapter to violate any  
11 prohibition requirement of a regulation  
12 promulgated pursuant to the subchapter shall be  
13 a violation. And, you know, as I read that, it  
14 seems like the monitoring provisions either are  
15 a regulation pursuant to this subchapter or  
16 they're not.  
17 MS. WOOD: They may not be for the  
18 purposes of 414, but I think what Congress is  
19 trying to do in that sentence is make sure it's  
20 enforceable, because they're addressing your  
21 exact concern, which is what is the point of  
22 having this monitoring requirement if there's no

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1 stick with which to enforce people complying  
2 with it?  
3 JUDGE WOLGAST: Exactly, but doesn't  
4 this lead us then -- it's part of the Act for  
5 one purpose and not part of the Act for another  
6 purpose?  
7 MS. WOOD: I don't think it is part of  
8 the Act, and I don't think that that sentence or  
9 the fact that it's enforceable through the Act  
10 makes it a part of the Act. I think, indeed,  
11 when you look at the language of the sentence  
12 I'm saying that ties it to Subsection E of 412,  
13 it says Title 4 of the Clean Air Act. And  
14 again, this goes back to an argument that was  
15 discussed earlier.  
16 Congress was very careful not to  
17 say "this Act." This section does not have  
18 the prefatory language that says the Clean  
19 Air Act is amended. But I do think they  
20 wanted to make sure that at least if someone  
21 did not comply with this requirement, that it  
22 would be enforceable.

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1 And it makes sense, given the fact  
2 that these were electric utility units  
3 subject to the acid rain program -- to tie it  
4 to a provision in the acid rain program.  
5 That doesn't mean it became part of the Act.  
6 JUDGE WOLGAST: But the problem I'm  
7 having is for it to be enforceable, you have to  
8 be able to invoke the jurisdiction of the court  
9 under 113, as you stated. And in order to plead  
10 that, by terms of 113, you have to show that  
11 there is a violation of a requirement or  
12 prohibition of the subchapter, or in this case,  
13 4(a).  
14 MS. WOOD: I'd have to look at the  
15 exact language of E. I don't know if you have  
16 it in front of you.  
17 JUDGE WOLGAST: Of -- I'm sorry.  
18 MS. WOOD: Of 412(e)?  
19 JUDGE WOLGAST: In fact, I do. "It  
20 shall be unlawful for the owner or operator of  
21 any source subject to the subchapter to operate  
22 a source without complying with the requirements

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1 of this section and any regulations implementing  
2 this section." Then that sends you to the  
3 enforcement provisions of 414 that talks about  
4 regulations promulgated pursuant to this  
5 subchapter shall be a violation, and then that  
6 takes you to 113, which is the general  
7 enforcement provisions.  
8 MS. WOOD: But I don't see how taking  
9 those steps makes Section 821 a part of the Act.  
10 I think Congress was very careful to keep it  
11 outside of the Act, but also wanted it to be  
12 enforceable. So they make the cross-reference  
13 to E, just as they also cross-reference A and B  
14 of Section 412 as to the timing and the manner  
15 in which the monitoring should take place.  
16 Other legislative history also  
17 supports this --  
18 JUDGE REICH: We have another  
19 question.  
20 MS. WOOD: You have another -- I'm  
21 sorry.  
22 JUDGE WOLGAST: Yes. One other quick

110	<p>1 question. On page 8 of your brief, and this is  2 to go back to the text itself of 821. You say  3 that it wasn't congressional intent that  4 the -- and I'm probably not using your exact  5 verbiage here, but it says that the provisions  6 including 821 didn't amend -- and then these are  7 your words: "Or add to the text of the CAA."  8 And I understand where you say it "did not  9 amend," because that's in the title of the  10 section itself.</p> <p>11 And my question is, your verbiage  12 "or add to?" And for that premise, are you  13 relying on text or are you relying on the  14 legislative history of 821?</p> <p>15 MS. WOOD: I'm not sure that when we  16 made that sentence, that we, frankly, gave it  17 that much thought. I think we're talking about  18 amending the Clean Air Act. We're probably  19 meaning where you're changing the language. And  20 perhaps when we said "add to" we meant "adding,"  21 like, for example, the acid rain program was  22 added, it was an entirely new title.</p>	112	<p>1 the Clean Air Act, an agency may only reverse  2 that interpretation pursuant to notice and  3 comment rulemaking. EPA may not reverse that  4 interpretation pursuant to subsequent  5 guidance, documents, or briefing in this  6 matter.</p> <p>7 I wanted to focus a little bit more  8 on the statement of Congressman Moorhead and  9 the legislative history of Section 821. And  10 this goes to you, Judge Reich, on this part  11 that you were quoting about the purpose. And  12 I had the chance to look at that. And in the  13 second part of the purpose, it says, "We need  14 to form a baseline so we know what the  15 utility effort is in cleaning up the problem,  16 so that we know when to give them credit for  17 their reductions, and when we know they are  18 not perhaps moving as quickly as we would  19 like."</p> <p>20 So it assumes that utilities will  21 be addressing carbon dioxide emissions.  22 And then I also want to just</p>
111	<p>1 I don't think that it was -- that  2 the use of both words was intended to have  3 any great impact.</p> <p>4 JUDGE REICH: Okay, thank you.</p> <p>5 MS. WOOD: Thank you.</p> <p>6 JUDGE REICH: We have Sierra Club for  7 up to five minutes of rebuttal.</p> <p>8 Ms. Spalding.</p> <p>9 MS. SPALDING: Thank you. As I have  10 already discussed in our briefs and our previous  11 argument, Section 821 is part of the Act. And I  12 want to make a further point, that by describing  13 821 as part of the Clean Air Act in its  14 rulemakings, EPA has adopted an interpretation  15 of those provisions of the Act that is due  16 deference. And the EPA cannot arbitrarily  17 change that.</p> <p>18 Moreover, under the D.C. Circuit's  19 line of cases, including Paralyzed Veterans  20 v. MCI Center, once an agency has adopted a  21 legal interpretation such as EPA's  22 interpretation that Section 821 is part of</p>	113	<p>1 clarify one point that maybe doesn't need to  2 be said, but I think that sometimes in the  3 context of this argument, there's been a  4 conflation of the requirements of  5 Section 821, and the interpretation of  6 Section 165, of the term "regulation" in  7 Section 165. And I want to make sure I say  8 that the -- of course, the Section 165 was  9 adopted in 1977 and the 1990 amendments to  10 the Clean Air Act and the legislative history  11 of those amendments doesn't determine what  12 the Agency's interpretation should be under  13 Section 165, to the extent that that issue  14 has gotten confused.</p> <p>15 I also want to point out that this  16 distinction between a pollutant subject to  17 regulation and a facility subject to  18 regulation is really just a red herring. The  19 pollutant is subject to monitoring.  20 Monitoring is a form of regulation.</p> <p>21 Even with pollutants that are  22 subject to actual control of emissions, it's</p>

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1 the facility or the operator. And not even  
2 the facility, it's the operator that is  
3 subject to regulation.  
4 And with the various dictionary  
5 definitions of the term "regulation," the  
6 point is that Congress used the same word in  
7 two different provisions, and there has been  
8 no appropriate level of analysis about why  
9 that word should mean different things. That  
10 has been available for public input.  
11 The remand in this case is  
12 important, because this interpretation, which  
13 is explained for the first time in this  
14 permit proceeding, is among the most  
15 significant decisions EPA has made under the  
16 PSD program.  
17 If EPA does have discretion to  
18 adopt this interpretation, given the  
19 tremendous significance and implications of  
20 this decision, it must adopt it only after  
21 giving the public an opportunity to provide  
22 input. This will allow primary policy

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1 decisionmakers in Region 8 and EPA  
2 Headquarters to meaningfully consider all  
3 relevant implications and factors before  
4 making a final decision that writes this  
5 interpretation into stone.  
6 And finally, I just want to say a  
7 word about the future. Absent some  
8 intervening action by Congress, BACT limits  
9 will be applied for carbon dioxide emissions  
10 eventually. If not because of Section 821,  
11 then because of an endangerment determination  
12 or because of the Appropriations Act of 2008,  
13 which is not cited in our briefs. And I only  
14 mention it to point out that it requires EPA  
15 to use its existing authority under the Clean  
16 Air Act to establish regulations requiring  
17 monitoring and reporting of greenhouse gases  
18 within 18 months. So those monitoring and  
19 reporting regulations are coming, and it's  
20 explicitly under the Clean Air Act.  
21 In the meantime, coal-fired power  
22 plants now being permitted will begin spewing

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1 millions of tons per year of carbon dioxide  
2 into the air, and will operate for a  
3 half-century or more, dramatically limiting  
4 our options for reducing this nation's  
5 greenhouse gas emissions and minimizing the  
6 worse effects of climate change.  
7 The Board should remand the Bonanza  
8 permit and require Region 8 to include a BACT  
9 limit for carbon dioxide.  
10 JUDGE REICH: Thank you. I'd like to  
11 thank counsel for the excellent quality of  
12 argument this morning. I'm sure it will be  
13 helpful to the Board in its deliberations.  
14 And this hearing stands adjourned.  
15 (Whereupon, at approximately  
16 11:58 a.m., the HEARING was  
17 adjourned.)  
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